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Public Trust Doctrine Applicable to Water Rights

Assembly Committee on Water, Parks and Wildlife

California Legislature

Assembly Committee

on

Water, Parks and Wildlife

PUBLIC TRUST DOCTRINE
APPLICATION TO WATER RIGHTS

Sacramento, California

NOVEMBER 21, 1988

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February 15, 1988

Dear Friend:

One of the most important issues we face in California is the allocation of our water resources. The application of the public trust doctrine to water rights will play a critical role in terms of how we manage our water resources in California.

This transcript of a November 21, 1988, Water, Parks, and Wildlife Committee hearing contains an overview of the public trust doctrine from many perspectives.

If you have any questions regarding the summary or specific bills, please contact the committee staff at (916) 445-6164.

Sincerely,

JIM COSTA
Chairman

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CHAIRMAN JIM COSTA: I'm Jim Costa, the Chairman of the Committee. We have Mr. Phil Isenberg here this morning, as well, a Member of the Committee, and others will come and go from time to time.

The hearing is being recorded and a written transcript will be prepared. As such, we would request that you identify yourself for the record when you begin your presentation. In addition, written testimony will be accepted as part of the official record of the hearing until Monday, December 12. So, for those of you who would like to submit further information, or for those not able to make the meeting, who would like to add to the official transcript, we would welcome that information from all parties.

Our subject today, I think, is one of the most important issues dealing with our water resources in California. It deals with the public trust doctrine application to water rights, one that has been in the past, and continues to be, an issue that will play a critical role, in terms of how we manage our water resources in California.

Depending upon what side you take, the public trust doctrine is either viewed as a threat to the appropriative right system we have here in California, or a toll to modify water right permits, or licenses granted by the state prior to the 1950's, certain fishery and other public trust resource protections having been placed into law at that time.

We have a lengthy agenda, as you can see. For those of you who haven't picked up the agenda, it's down there at the desk.

So, we would ask people to be to the point, and as concise as possible.

I do want to make an addition: We will have the Department of Fish and Game, represented by their legal counsel, Gene Toffoli, who will make a presentation on behalf of the Department at 4:30 -- hopefully, before then, if every one moves appropriately.

We also are going to juggle the schedule. The Chairman of the California Chamber of Commerce, Howard Marguleas, scheduled to speak at 10:05, has a plane problem and will be getting here a little bit later, and we will adjust accordingly. As such, we'd like to begin with Mr. George Gould, from the McGeorge School of Law, who is prepared this morning to give an overview of the public trust doctrine from his respected legal vantage point.

Mr. Gould.

MR. GEORGE GOULD: Thank you, Chairman Costa.

I would like to say it's a pleasure to be here today. I just returned from a two-day conference on the public trust doctrine in court; so, at least, the subject is well on my mind.

Before I begin my presentation, there are a couple of things I would like to say. One is to identify my bias in this matter. I am a critic of the public trust doctrine; however, today I shall attempt to push that aside and present a neutral, descriptive presentation of the law, as it exists in California, at the moment. I hope it will be an accurate one. I'm sure that those who follow me...And I notice on the agenda there are people who come from all perspectives on this question; so, I'm sure that

if I do make any errors, they will ...

CHAIRMAN COSTA: ...They will correct it.

MR. GOULD: I'm sure they'll attempt to correct those.

To begin with, it might be useful to start with some sort of a definition, and I would offer the following definition, with regard to the public trust doctrine: In my mind, the public trust doctrine, essentially, prohibits or restricts private rights in certain natural resources, in order to protect or enhance certain public values in those resources.

The historical development of the public trust doctrine is sometimes traced to Roman Law, English Common Law. At the conference I just attended, one speaker even found traces of it in Nigerian Law. So, it has a long history.

In this country, however, almost any discussion of the doctrine begins with an 1892 decision by the United States Supreme Court, Illinois Central Railroad v. Illinois. To understand that case, a few facts are necessary: Illinois acquired ownership of the bed of Lake Michigan, within the State of Illinois, under a doctrine known as the "Equal Footing Doctrine". All states under that doctrine acquired title to, upon admission to the union, the beds of navigable bodies of water.

In 1869, the Illinois Legislature made a grant of 1,000 acres in the Chicago Harbor to the Illinois Central Railroad. The grant was free. In other words, it was not a sale; it was a grant. I believe the state was to receive certain royalties, or that sort of thing, from the use of the lands; but, it was, essentially, a free grant.

In 1873, the Legislature apparently thought better of its decision and rescinded the grant. The railroad then brought suit, asserting that this attempted rescission was a violation of both the contract's clause and the due process clause of the Federal Constitution.

The United States Supreme Court held that it was not, and that the State of Illinois could repeal the grant. The Supreme Court found that these lands -- that is, the lands under navigable bodies of water -- were different than other property the state might own. They were held in trust and could not be alienated. However, the Court did note certain exceptions to this rule: One was if the alienation improves the trust. In other words, they noted that the alienation of trust lands for wharves, docks and that sort of thing, might be appropriate. In addition, if it did not substantially interfere with the public's use of these waters, it would also be appropriate. So, except for those two exceptions, the Court said that the Legislature does not have the power to transfer -- irrevocably, at least -- the beds of navigable bodies of water.

The source of law that the Court applied, in this opinion, is not clear; the Court never tells us. Reading the opinion, one would presume they were talking about some federal principal -- presumably, federal constitutional law; however, in a subsequent case, Applebee v. New York in 1926, the Court said they were applying Illinois law.

I think it is clear today that the public trust doctrine is a matter of state law; that is, that the United States Supreme

Court, at least, is not going to "cram it down the throat" of any state which chooses to reject it, nor for that matter, is it going to determine the content of the doctrine.

There are a couple of things that I think are notable about the decision. First of all, you might note that it restricts the Legislature. The Court, essentially, found that the Legislature did not have the power to transfer these lands -- irrevocably, at least -- into other hands of a private party. Now, it's a restriction on the Legislature, which the Legislature later used to its advantage, since it allowed the Legislature to take back this property without running afoul of the federal constitution.

It is also what I call, "a rule of no compensation". It is not really a grant of power to the state; the state has adequate power, under the police power and the emanate domain, to accomplish anything it wants in the natural resources area. What the public trust doctrine allows the state to do is to reacquire -- or regulate -- certain private property without requiring compensation that might otherwise be required. I emphasize the word "might", because as many of you know, I'm sure, the Fifth Amendment of the United States Constitution -- the requirement to pay compensation -- is not clear and it's not an easy doctrine to deal with; in some cases, compensation may be required, and in others, it is not. But, this doctrine simply short-circuits that.

Until recently, it was a rule that also applied, principally, to submerged lands. Historically, it has been used

to protect navigation, fishing and commerce.

And, finally, as a general introduction, I would note that it is not universally applied throughout the United States. Some states have accepted it very broadly; others have no law on it. I'm not aware of any state that has absolutely rejected it, although there may be such states.

In California, the doctrine has a reasonably long history. It was applied in 1913 in a case called People v. California Fish Company to California tideland grants. Later, the Supreme Court extended it to other submerged lands -- lands under other navigable bodies of water within the state that are not tidelands. Further, the California Supreme Court has also extended the kinds of uses that are protected by the doctrine beyond the navigation, commerce and fishing to include: bathing, swimming, recreational boating, and in general, the preservation of the natural environment in these kinds of lands.

In general, I think, it is clear that California has been a leader in giving the doctrine very liberal interpretation, and probably has gone as far as, or further than, virtually any other state in the United States.

There is one difference, I think, between the way the doctrine is applied in California and the Illinois Central case, however: The California Supreme Court, rather than holding that grants of trust lands are invalid, or voidable, has held that the grant is valid, but that the grantee take subject to a public trust servitude. That servitude limits the use of that property and prohibits its use in a manner which would interfere or injure

public trust values. That is the major distinction.

The Court has indicated that the Legislature can extinguish the servitude, but only if the intent is clear, and only if it furthers trust purposes.

As I indicated earlier, until recently, the doctrine applied, principally, to submerged lands, and that was true in California, as well. The 1983 decision, National Audubon Society v. The Superior Court of Alpine County, is, of course, the decision which changed that rule in this state and applied the doctrine for the first time to appropriative water rights.

California was, again, a pioneer in doing this. There is only one other decision, the North Dakota decision from 1976, which, prior to that time, had applied the public trust doctrine to water rights. The North Dakota decision, in addition, is a very limited one, in my view, and consequently, really does not have the kind of force and revolutionary effect that the Audubon case has.

I'm sure most of you are familiar with the facts in Audubon. Very briefly, however, the case arose as a result of permits issued by the predecessor of the Water Resources Control Board to the City of Los Angeles, in 1940, to divert water from four of the five tributaries that feed Mono Lake. The Lake is a closed lake -- it has no nature outlets; so, the level of the Lake is a balance between evaporation and inflows. If you increase the inflows, the size of the Lake increases; if you decrease the inflows, the Lake shrinks, because more water is evaporated than is coming in.

As a result of these diversions, the Lake began to shrink. That accelerated very greatly in 1970, when Los Angeles completed a second aqueduct and began to divert, substantially, more water and precipitated the Audubon suit. The Audubon Society argued that this activity violated the public trust doctrine. Los Angeles, quite naturally, pointed to its permits, which had been issued by an agency of the State of California, pursuant to statutes enacted by the Legislature. It said, "Look, we have the legal authority to do this." In addition, it urged that its rights were, I think, essentially, vested rights, which could not now be terminated.

The Court -- the California Supreme Court -- received the decision, principally, as an advisory opinion. The case was actually in federal court, and the Supreme Court was asked to decide whether or not the water rights, which Los Angeles held, could be reexamined at this time, under the public trust doctrine. The Court rejected L.A.'s argument that the water rights statutes had subsumed the public trust doctrine, as far as it applied to the diversion and use of water in California.

At the other extreme, it rejected Audubon's argument, that any use which harms public trust values is, first, illegal. Now, the Court noted the importance of the appropriation doctrine and the appropriation and diversion of water to the economy of California and to its citizens, and consequently, was unwilling to simply say that any use is, first, illegal.

And in this regard, I think the doctrine, as applied to water rights, is different than the doctrine, as applied to land,

because, as I indicated earlier, as applied to land, the Court has taken the view that there is a servitude which prohibits the use of public trust lands in a manner which injures trust values. With water, we find the Court saying that the public trust doctrine does not prohibit the use of water in a manner which injures public trust values.

Nevertheless, the Court said that the state had an obligation to consider trust values in allowing its water to be diverted and appropriated. And in the case of Mono Lake, the Court said this had never been done, and therefore, it was appropriate for the water rights held by Los Angeles to be reconsidered, in light of the trust values that were being injured.

The Court went further than that to find that all water rights, even those that have previously had a trust evaluation, may be reconsidered from time to time to determine whether or not they are now being used in a fashion which violates the public trust.

The Court went out of its way, I think, to note that vested rights do not bar reconsideration, reiterating its view that Los Angeles or, I suppose, some private party, could not claim that its water rights were free of the public trust doctrine, or could not be reexamined, because it might constitute a taking of property.

CHAIRMAN COSTA: All vested rights?

MR. GOULD: It seems, all vested rights. I'll get to that in a little more detail, in a moment.

The Court also went on to hold that both the courts and the Board of Control have concurrent jurisdiction to consider trust issues.

In many respects, the decision of the Court resembles the public interest balancing that the Board of Control does when it issues permits. For a number of years now, the Board, in issuing permits, has been required to examine the public interest and to issue permits only where it determines that would be in the public interest. It is also clear, under the California statutes, that the public interest includes the protection of recreational and environmental values, and that the Board had, and has, long engaged in this sort of process in issuing water rights.

The Court, however, noted two differences between those statutes -- or, noted at least one difference; there is one additional difference, as well. The Court said that, unlike the statute -- or, it said, with regard to the statutes -- those statutory protections can be repealed, implying, of course, that the public trust doctrine could not be. So, in my view, at least, the Court was continuing to indicate that the doctrine, to some extent, may be a check on the Legislature itself.

In addition, the other difference is, of course, the one you alluded to, Chairman Costa, in your opening remarks, that the public interest criteria can only be applied prospectively. When the Board issues a permit, it imposes conditions to protect the public interest. It has, in recent years, included a kind of retroactive approach by reserving jurisdiction to later change those conditions. But, nevertheless, the public interest

criteria, under the statutes, at least, does not seem to give the Board authority to come back and revisit water rights issued before it began that practice. The public trust doctrine, on the other hand, does this. So, that's the other major distinction.

Now, there have, to date, been no actual applications of the doctrine in California. The Audubon case got stalled procedurally and is just now, I think, beginning to reenter an active phase, where it will actually begin to examine the issues substantially and determine what limitation, if any, will be placed on Los Angeles.

The doctrine has also been raised in some other cases in California; but, to my knowledge, there are none yet in which there has been an actual application of the doctrine to restrict or limit water rights. So, it's a little difficult to tell, actually, how the doctrine will be applied.

There are a number of unresolved questions raised by the doctrine. One of these is the waters to which it applies. Does it apply to nonnavigable waters?

There has been a historic association of the doctrine to navigable waters. In the Audubon case, the Court ducked the issue, in a sense. The streams, according to the Court in Audubon, were nonnavigable, but Mono Lake is navigable. And the Court did, at least, extend the doctrine, to the extent that activities in nonnavigable waters would injure trust values, and in navigable waters, the Court said the doctrine could be applied. There remains the question of whether or not the doctrine can be applied in a situation in which we're dealing with activities

which will only have an effect in nonnavigable waters.

A second question remains, regarding the application of the doctrine to stored waters -- waters behind reservoirs, rather than naturally flowing waters.

Another unresolved question concerns the right, subject to the doctrine. Clearly, appropriative water rights, subject to a permit issued by the Board -- and that has been true since 1914 -- are subject to the doctrine.

What about riparian rights? What about 1914 pre-permit rights? I think, while the Court did not address this issue, in my own view -- and there has been some legal discussion about these questions -- it seems to me quite clear that the Court would apply the doctrine to all water rights in California. So, I doubt that there is any limitation in that regard.

One of the more important questions is the balancing problem. In Audubon, the Court, essentially, laid down a balancing test, that you have to consider trust values and balance those against other uses for the water -- uses for irrigation, for industry, for municipalities, et cetera. The Court, however, provided no standards for conducting that balancing, and, of course, that remains an unresolved question. Quite understandably, environmental groups take the position that the doctrine requires the Court to give trust values special consideration, special weight, and a demonstrable bias in the balancing process. Quite understandably, water-using groups argued that the doctrine only requires consideration of trust values and that there is no special weight given to those trust

uses.

Another problem, or unresolved question, is the apportionment of the burden. Assuming that you're going to restrict water withdrawals to protect trust uses, who is going to bear that burden? Is it going to be the person against whom the suit was initially brought -- L.A., in the case of the Audubon? That seems doubtful, since L.A. joined 117 other parties in that case, and that seems likely in most instances. Is it going to be applied by the rule of priority -- the traditional rule in the west -- so that those most junior will have to give up, or modify, their practices to provide trust water? Or, is there going to be some other sharing mechanism, perhaps more broadly shared, on some basis of "equity"? And I put that word in quotes, since it's always difficult to agree what that means.

Another important question, I think, are the criteria for reconsideration. The Court indicated that water rights could be reconsidered from time to time, even where there had been a prior trust balancing. The difficulty that comes is, how often will that occur, and what will be the criteria for doing this? The problem is exacerbated, because the Court held, essentially, that anyone has standing to raise a trust claim. And water-using groups, I think, are understandably concerned that their water rights may be repeatedly challenged on a public trust basis.

The most logical criteria for reconsideration, I think, would be a criteria of changed circumstances, that the person challenging the water rights since the last trust balancing, would have to show some change in circumstance. Here, again, though,

even if this is adopted, it's not clear what change circumstances might constitute. Does that mean a change in the scientific understanding, or a change in the water regime -- the "dryer years", for example -- or does it simply mean a change in public attitudes? The issues there are numerous.

To summarize, very quickly, there are a couple of other issues...But, I see I'm rapidly running out of time, and I'm sure you would like to stay on schedule. Let me say just a couple of things with regard, first of all, to some of the effects of the doctrine, and also, perhaps, the role of the Legislature.

The doctrine has created a great deal of uncertainty in California. And the unanswered questions that I just addressed contribute to that uncertainty; the argument is made that this uncertainty, particularly, impedes new development. The existing users have to live with the doctrine, and they've already made their investments. And with regard to them, it's just a matter of waiting to see what the future holds. But, new developments, the argument is made -- at least, because of the uncertainty -- may be reluctant to make large capital expenditures, if their water rights are as uncertain as this doctrine makes them.

The search for certainty has always been kind of a principal theme of western water law, and that is the asserted advantage of the appropriation doctrine over the riparian doctrine, that it gives water rights holders greater certainty.

Now, the truth, and how much actual development is precluded by the doctrine, I think, remains to be seen. California water law already has a very substantial amount of

uncertainty in it, and whether or not the public trust doctrine contributes enough more to really make much difference or not, I think is a very debatable proposition.

Finally, with regard to the role of the Legislature, in my view, the Court would respect legislative decisions that attempted to answer some of these unanswered questions, and to otherwise deal with the doctrine, at least, if it were not in the extreme. Perhaps, if the Legislature tried to abolish the doctrine, the Court might react differently. But, my guess is that the Court does not want a confrontation -- a constitutional confrontation -- over this issue, and would probably respect legislative decisions in this regard.

One final comment: It does seem to me that one of the difficulties of the doctrine is that it puts courts in a role which I do not think courts are particularly designed to carry out, and that is, this difficult role of balancing competing public interests. And certainly, I think that some other body, perhaps the Board of Control, an agency with a broader perspective, might be more appropriate, at least in the first instance, to address those questions.

CHAIRMAN COSTA: Well, we appreciate your testimony.

As to your last point, some newspaper columnists would argue that the Court would be in a better role to provide that balancing act than the Legislature.

MR. GOULD: Yes. Obviously.

CHAIRMAN COSTA: But, I don't necessarily subscribe to those columnists.

You raised many questions. Although we won't be able to deal with them all this morning, I think you piqued a number of minds here, among Members of the Committee. You had indicated that the Court is, about now, trying to determine that role. The questions, prospectively, are, how we progress and look at legislation in this coming session, how are we to gage whether these questions are going to be answered in court and how many of these questions may be answered by the Water Resources Control Board as they ponder...

MR. GOULD: ...I think one of the difficulties, again, is that the Board, in fact, in the American River litigation and its referees report, did provide some tentative answers to some of the questions I raised. The difficulty is that, as the matter now stands, this is a court-made doctrine. And while the Court may give a great deal of consideration to the Board's determinations, particularly with regard to these legal questions, the Court is not bound by them, and as I see it, that's one of the difficulties with the doctrine. But since it's a court-made doctrine, we don't know the answers to these questions and won't know them, I think, with absolutely certainty, until the California Supreme Court addresses them. And that will take, I think, years and years and years of protracted litigation, before many of these questions have a definitive answer. And I see that as one of the real negatives of the doctrine, that it creates uncertainty, and that uncertainty is partly just the unanswered questions that are out there.

CHAIRMAN COSTA: Well, uncertainty is a part of a

political fact of life. What advice would you give us, as we're attempting to deal with some of the major water policy questions in this state, over the next several years, as we attempt to maintain appropriative rights, but at the same time, balance other needs that we view as a part of the overall solution to some of our water problems?

MR. GOULD: Well, certainly, with regard to the public trust doctrine itself, you'll hear testimony from others, and I think the Legislature is probably going to have to, I suppose, sort out where it feels it has an appropriate role. And I'm not sure I'm prepared, at this point.

CHAIRMAN COSTA: Do we have an appropriate role?

MR. GOULD: Yes, I think you do. As I indicated, I think the Legislature could, and perhaps should, address some of these unanswered questions. I believe the Court would respect those determinations. And consequently, it is quite possible that they could be answered more quickly.

The other role that I see for the Legislature might be a more aggressive role in attempting to provide leadership and guidance in some of the underlying issues that cause the public trust doctrine to be raised in the first place -- the balance of consumptive use against environmental protection. For example, I think California would benefit greatly by a good comprehensive instream flow legislation which attempted...In many cases, I think there may not be problems, at this point, on the streams. In other words, if you got in now, I'm sure that others will testify that there are enormous problems in some places, and that's

probably true. But, in many cases, if some things are done now, the problem is not there. If, on the other hand, nothing is done and the situation continues to get worse and worse, then eventually, the public trust doctrine will be applied, perhaps retroactively, perhaps to undercut certain people's rights. Whether or not they have a vested property right, when you take something away from private parties, they feel like they've been unfairly injured, and I think if you can do it prospectively, it's always a better approach.

A part of my criticism of the doctrine is exactly that I would prefer to see -- I'm not opposed to many of the aims of the doctrine -- a good aggressive instream flow approach identify the water needs of the state, and attempt to go out and prospectively provide for them. Where they can't be provided for in that fashion, perhaps there are a variety of approaches that might be taken. The purchase of...

CHAIRMAN COSTA: ...In some cases, the Board has established minimum flows...

MR. GOULD: ...Yes...

CHAIRMAN COSTA: ...and in other cases, they have studies that are currently being pursued, but they're moving slower.

MR. GOULD: Yes, although it is...And perhaps, one of the other people who is more familiar...Off the top of my head, I cannot remember the precise answer, but I think the objection that many environmental groups and fish and game groups have had to the current practice is that they fight the same battle over and over,

that while the Board has established or required the protection of instream flows, they do it on a permit-by-permit approach, so you're never sure you've won the battle. Finally, there's never a saying that this water is dedicated to this purpose and is off limits, and I think that's one of the...

CHAIRMAN COSTA: ...How would you suggest we address that in legislation, the maintenance or protection of instream flows?

MR. GOULD: There is a variety of legislation around the west that does so. Some states have statutes which allow a state agency to appropriate water for instream purposes. The state agency -- now, that put the states at the bottom leaf -- won't solve all the problems. In other words, it will come after existing uses; but, nevertheless, it at least gives the state a way of protecting against future harms. Another is to simply establish certain minimum flows and reserve a quantity of water to protect that. What you're saying, in effect, is that no additional permits for appropriation can be issued which would violate this particular standard. That's a second approach, and most of the approaches throughout the west are a variation on that theme in some fashion or another.

Montana has a very comprehensive statute in which they establish them and go back and look at them every 10 years. Now, I'm not particularly fond of the Montana scheme. Montana doesn't have nearly the water problems that California does, and I think it has been easy for them to reserve a lot of water without hurting anybody too much, at this point, and the hard tests are

going to come on down the road for them. But, there are a lot of models out there that could be used to do this, and that's at least one approach. It won't provide the total answers to these questions, certainly.

CHAIRMAN COSTA: Mr. Waters, for a question.

ASSEMBLYMAN NORMAN WATERS: No, I didn't have anything to ask.

CHAIRMAN COSTA: Oh. I thought you were getting ready there.

Okay. We appreciate your comments, and if you might be willing to stay around for a bit, we may want you to come back.

MR. GOULD: Okay. It's my intention to stay for the morning. I do have to teach a class this afternoon...

CHAIRMAN COSTA: ...I understand.

MR. GOULD: ...and I have not yet prepared for it. So, I'm going to have to leave after lunch to do that.

CHAIRMAN COSTA: All right. We'll look forward to using you as a resource in the future.

MR. GOULD: I would be glad to do that. Thank you.

CHAIRMAN COSTA: Thank you very much.

All right. Mr. Marguleas hasn't come in yet, has he? No. All right. Well, then, we'll begin with the panel.

What I'd like to do today on our panel presentations is have the individual panelists make their presentations, and then have all four persons come up for a question and answer period with the members.

So, our first witness from the first panel, dealing with

the Bay-Delta proceedings before the State Water Resources Control Board, is Art Littleworth.

MR. ARTHUR L. LITTLEWORTH: Good morning.

For the record, my name is Arthur L. Littleworth. I am a partner in the law firm of Best, Best and Krieger, and I'm counsel for the State Water Contractors in the Bay-Delta hearings, and that was the subject that I was asked to speak about, particularly, this morning. I've passed out written copies of my testimony, but I think I'll try to speak just from notes. I also have a couple of comments on things that Professor Gould remarked upon.

The state contractors are a group of the public agencies that have contracts with the State of California to take water from the State Water Project -- and that project as you also know, lives up to its name now; it does, in fact, produce water for all parts of the state. We now have water flowing into Napa, Solano and Alameda counties, and into the South Bay Area and to San Jose, and into the San Joaquin Valley, from Ventura to San Diego, and we're south of the Tehachapis.

The State Water Resources Control Board is now in the process of part of a three-year plan to develop a new water quality control plan for the Delta and for San Francisco Bay, and then, to review water rights in connection with the implementation of that plan. It's important, I think, to note that these proceedings are not aimed merely at protecting beneficial uses in the Delta and in San Francisco Bay itself, but rather, are required to address the beneficial uses that are made

of the Delta waters, so that, in fact, when this plan is being considered, it must also then consider the use of Delta water for city and for farm purposes.

What the State Board is doing now is, it's operating under the Porter Cologne Act, an act which has been in the law for a long period of time -- a basic planning statute for water matters. And the Board doesn't have to rely on any authority of the public trust doctrine; as a matter of fact, the Board would probably be proceeding just exactly as it is, if the Audubon case and the public trust doctrine had never been enunciated as part of California's water law.

The Racanelli decision, which interpreted the base and planning statutes, with respect to the proceedings that the Board is now engaged in, says that the Board has wide authority to attain the highest quality, and I'm quoting, "which is reasonable, considering all demands being made, and to be made, on those waters, and the total values involved." The objectives of the plan are to provide reasonable protection that is consistent with the overall statewide interest and consider all competing demands for water. So, we necessarily have a balancing process which is set up, under the Porter Cologne Act.

What we have seen in the Bay-Delta hearings, however, in my judgment, is the effort by a number of parties to skew that balancing process, to begin to use the public trust doctrine as a way of seeking a preference for public trust uses and not an evenhanded kind of balancing. I quoted in my statement, and I'll read just a couple of examples here, from some of the statements

that are made in the briefs which have been filed in the Bay-Delta hearing proceedings. One of the environmental coalitions argues that the State Board must, and I'm quoting, "adopt a demonstrable bias in favor of resource protection." They contend further that the protection of trust resources must be afforded greater weight than other aspects of the public interests, that the Board must establish standards which are sure to protect the instream uses, and that California law now requires the Board to deny environmentally-destructive uses.

The California Department of Fish and Game seems to be generally on that side. It states in its brief that fish and wildlife uses should have, and I'm quoting, "a higher priority than meeting the export needs." And we saw a statement filed by the League of Women Voters in one of the public hearings, in which they recommended the public trust uses be accorded, and I'm quoting, "a separate and special validity over the other beneficial uses of the estuary."

So, we are looking at a situation where we have a number of these legal questions that are still unresolved, and we're beginning to see the proceedings in which some of the answers will be coming about, unless the Legislature should intervene to give some direction. And the first thing we are seeing is that there are major efforts that are being made which, in my judgment, are to expand the public trust doctrine from what the Supreme Court talked about in the Audubon case. And I would agree with what Professor Gould said.

In the Audubon decision, they talked about considering

and taking into account the instream values, as you begin to weigh those against the consumptive uses of water. There certainly was nothing in the Audubon case that would indicate that public trust uses should receive a preference; as as matter of fact, in the Audubon case, the flip side of the argument was made. Los Angeles argued that municipal uses should, in fact, have a priority. And it's in a footnote, as I recall.

But, in any event, the Court said that there are no priorities in this kind of a situation. But, despite what you find in Audubon, you see the efforts being made in the proceedings now, which are so important in how our water is going to be allocated, to take bits and pieces of the language out of the cases and fashion some kind of a preference for public trust uses. And that's despite the fact that the Audubon case makes it clear that there can be appropriations of water, even though there is foreseeable harm to the public trust uses, and even though taking water out of the stream does not promote, but may unavoidably harm, the trust uses in the stream.

Now, as you are all also aware, we have just received the State Board's staff's draft plan in the Bay-Delta proceedings. One of the features of that plan is to recommend that there be 1.5 million more acre-feet of spring flows devoted to instream uses, primarily for salmon and striped bass. They get this water partially by saying that some additional flows should come down the Sacramento, partially by saying that some should come out of the San Joaquin side, and partially by reducing the exports of the state and federal projects in the springtime by 670,000 acre-feet.

In that plan -- to get those figures -- they have basically gone back to flows for salmon on a historic period of trying to reproduce average flows from 1930 to 1987, and they have tried to go back to a situation of exports between 1953 and 1967, that is to say, in essence, before any water was exported by the state water project, or by the federal project for Westlands Water District, rolling back the exports to that period of time.

Now, I don't want to get into the arguments about the merits of that kind of balancing here. Suffice it to say that the state contractors disagree very strongly with those figures and with the "balancing" that has gone into putting those recommendations together. But, I think what is important here, is the fact that it does not appear that the State Board's staff relied upon a preference -- a public trust preference -- to reach that conclusion. What they are saying is, they made a reasonable balance. I don't think that's true, and we're going to be arguing about that. But, they are saying we, basically, made a reasonable balance under Porter Cologne. They didn't reach back and say -- at least, there's nothing in the text which shows that they reached back and said -- that there is some kind of a preference, and we've got to do that.

I think that you can see the tremendous impacts which would occur if, in fact, there was a preference in the law for public trust uses. It would give the courts or the State Board the power to inflict untold damage on the economy of this state, if we were in a position where a preference was a legal requirement over all other beneficial uses.

Lastly, I want to make one other point on that Board report and the public trust uses: They begin that recommended plan with a California Water Ethic, and it has a number of points which deal with the management of water resources for farms, for cities, conservation, reclamation, conjunctive use -- all of the things which need to be done, and certainly, we have no disagreement with that. When I read that paragraph, though, I kept saying, "Where is the last sentence that says environmental uses must also be managed?" That's missing from the California Water Ethic, which is set forth in this plan.

Now, the law is pretty clear that instream uses, just like consumptive uses, are subject to the reasonable use doctrine of the constitution, and I think that it's really clear that public trust uses must be subject to the same kind of management requirements that we see for the rest of our consumptive uses, so we're not simply relying on large flows to meet our environmental problems, that we are going to have to be looking at a range of alternatives and managing environmental uses, which includes all kinds of non-flow measures, such as the construction of facilities, habitat restorations, fish screens, hatcheries and all kinds of things.

So, I guess the two points that, it seems to me, I would want to emphasize out of the Bay-Delta hearing process, as we are looking at the public trust doctrine, are: One, that public trust uses cannot be granted a preference, if we are to have any kind of workable water policy in this state; and secondly, that those public trust uses cannot be exempted from the same kinds of

management responsibilities that are imposed on other water uses.

One last comment: Professor Gould talked about possibly trying to establish some instream amounts and flows. I was on the Governor's Commission to review water rights law 10 years ago and we dealt with that question. It is a very difficult one. We did not come out with any particularly precise recommendations. What we did, though, is to reject one of the suggestions that was made, and that is that the Department of Fish and Game be allowed to apply for water. It just seemed to me, as I sat on that committee, that if that were the law and I were the Fish and Game director, I would tie up every stream in the system. I would file applications on every bit of water that was in the system, and by the time you got that sorted out, it would be 50 years from now.

So, I think that this problem of finding an appropriate balance and an appropriate amount of water for instream uses, versus the amounts of water that would be available for consumptive use, is certainly not easy, and probably some of the lessons that we have seen in other states may not be applicable, because, in fact, we are reaching the point where we have real conflicts on how that's to be settled.

Thank you, Mr. Chairman.

CHAIRMAN COSTA: Well, thank you, Mr. Littleworth.

I'm not so sure that any of the problems that we're dealing with here today are easy. If they were easy, we would have resolved them a long time ago.

With the competing needs that we're attempting to deal with, as we look at the public trust doctrine, you talked about

the attempt to provide a balance between consumptive uses and instream uses and the public trust doctrine. You noted that that balance seems to be missing in the State Board staff report. How would you recommend that we in the Legislature, in the next two years, if there is interest, attempt to provide some balance in this area?

MR. LITTLEWORTH: I think, in the balancing area, it's something where the Legislature could act, and where the courts would probably pay attention. We've got a very generalized kind of statement coming out of Audubon; but, I think that, with sufficient flexibility, if the Legislature were to lay out some factors that had to be taken into account, the courts would recognize that. Now, in my judgment -- and I want to make it absolutely clear -- public trust uses are one of the things to be considered, but they do not have a preference. That certainly is a negative way, perhaps, to approach some of these things, but that is certainly one thing that can be done.

CHAIRMAN COSTA: We establish preferences -- being "The Devil's Advocate" here, for a moment -- under the Porter Cologne Act and other statutes, for water usage. We have a statute which, in theory, sets forth priorities of water usages.

CHAIRMAN COSTA: Correct.

MR. LITTLEWORTH: I can't think of any case when it was ever truly followed. The highest is domestic, the next is irrigation and, in fact, recreation and other kinds of uses are way down at the bottom of the list someplace.

CHAIRMAN COSTA: Weren't those preferences attempted to

be applied during the drought of 1976-1977?

MR. LITTLEWORTH: Yes. I think that we've got some other drought-related statutes which do, in fact, set forth more specific ways in which water is to be allocated during a drought and, in fact, that has been done. But, we've got a couple of other situations out here, besides the water code, which set forth the priorities.

CHAIRMAN COSTA: Do you think Audubon renders Section 106 meaningless?

MR. LITTLEWORTH: Well, there is a statement that, at least, certainly restricts it and limits it. I think it's going too far to say that it renders it meaningless; but, it certainly begins to change the balance. But, I think that's where the Legislature does have some power to act and could begin to put some more realistic elements and preferences or priorities together.

CHAIRMAN COSTA: All right. Are there any questions?

The next member of our panel is Mr. Gregory Thomas, Attorney at Law.

MR. GREGORY THOMAS: Thank you, Mr. Chairman, Members of the Committee.

It's always a daunting assignment to follow Art Littleworth to the podium; but, I'll do the best that I can. He and I are on opposite sides of the Bay-Delta controversy...

MR. LITTLEWORTH: ...Be undaunted...

MR. THOMAS: ...and, perhaps, I can point out some of the differences in our view of the Board's decision.

By way of personal introduction, I'm a visiting Professor of Law at UCLA, teaching in the natural resources and environmental field, and also, of course, in administrative law. I also represent or counsel both non-profit environmental organizations and public agencies that are charged with resource management. We find that they have much in common, in terms of their limited budgets for paying legal fees.

The entities that we represent really do range over a broad spectrum, including, at one end, the organizations, such as the Sierra Club and the Audubon Society, and at the other end, Trinity County and the five-member San Joaquin Valley Drainage Program. The water resource management problems that we're involved in, that implicate the public trust doctrine, include the Bay-Delta proceedings that have been alluded to, problems of managing irrigation water in the San Joaquin Valley, problems on the Trinity River, the Clavey River, the Eel River and the Pitt River, just to give you the current agenda. So, the public trust doctrine is very much a daily part of the legal landscape that I deal with.

It should be clear that I have accepted the Committee's invitation to appear here as a practitioner and as an academic in this field, not on behalf of any particular entity that I work with. I want to be particularly clear about that, because the environmental organizations are still very much in the process of evaluating the staff proposal in the Bay-Delta proceedings, and it would be premature for me to indicate exactly what concerns, ultimately, they may want to register in Phase II of the

proceedings.

What I did want to do today was to comment briefly on AB 4439, Mr. Waters' bill, which purports to place procedural structures on the public trust doctrine. I take it that that's still a matter before the Committee. I had assumed I was going to be after the speaker from the Chamber, who was going to address that.

CHAIRMAN COSTA: Yes, but the speaker from the Chamber was late and we've had to reverse the agenda order. So, we're going to address that.

Mr. Waters is here. Actually, the initial reasoning for this hearing was because AB 4439 had come before the Committee. I felt, frankly, that not enough discussion had taken place for the Committee to render a good judgment on that piece of legislation, and persuaded Mr. Waters to put over the bill. I would hold an interim hearing, and then we could determine, at the next legislative session, whether or not he or other folks wanted to reintroduce this legislation, or similar legislation to it. And that was the initial reason for this interim hearing. Since that time, much greater interest has developed, I think, around the public trust doctrine, and a host of decisions on the environmental and water landscape, as well. So, I think it's important that we have this hearing today. Your comments on AB 4439 certainly would be welcomed.

MR. THOMAS: Fine. Thank you, Mr. Chairman.

Secondly, I do want to comment on just some initial observations on how the Bay-Delta water quality proceedings may

serve as an object lesson to us all on what, if anything, needs fixing with this public trust doctrine.

Turning first to AB 4439, as Professor Gould has indicated, California law is clear that instream uses and non-consumptive uses are beneficial uses under the law. I would submit that now, a decade and one-half, perhaps, into what's sometimes referred to as, "The Environmental Era", these instream values are quite universally recognized in the law, not only of California, but of other western states, as well.

The problem is that these values come to the fore relatively late in the process of allocating water rights, and the difficulty that we all face is accommodating these important late entries. The public trust doctrine is California's answer to that. And it's too late, I would say, in the political day to realistically challenge the importance or the workability of that concept.

It is notable that the proponents of AB 4439 do not purport to derogate the public trust concept; they instead purport to simply place some procedural restrictions on it. I note in the April 8, 1988 letter of support from the California Chamber of Commerce, and I quote, "AB 4439 will provide stability and certainty for water rights without substantively changing the courts' public trust in water doctrine."

Well, I want to talk about these problems of stability and uncertainty. First of all, it may be worth just repeating that there are two basic ways in which instream uses can be accommodated in the law -- or two basic approaches in western law,

at least.

Some states confer on public agencies' appropriative rights in these instream waters. Now, that does provide an element of certainty and predictably that may be beneficial. The problem, of course, is that, because relative priority to water is a function of the time at which a right is conferred, the late-coming right, namely these public trust rights, are at a decided disadvantage.

In California, we really take a different approach. We recognize a correlative right in the public resources. "Correlative" means a right that is balanced on some scale with other rights.

Now, I would submit that the fact that it's a public trust right does not mean that vested consumptive rights in water are being taken away in any sense. Rather, this doctrine recognizes that consumptive rights -- water rights in general -- are merely a right to use, not a right to possess, or to own, water; that right belongs to the people of the State of California, under the Constitution. What's more, these property rights in water are highly qualified rights. That's the teaching of Audubon, and it's the teaching of Racanelli and other cases in the public trust area; they're qualified, and subject to limitations on reasonableness of use and on beneficial use, and they're qualified by an overriding public interest in the non-consumptive benefits of rivers, and part of an inalienable common heritage. That's what we mean by a public trust.

Using the public trust approach avoids the problem of

the temporal subordination of public rights to private appropriation; but, it does introduce an element of uncertainty, which AB 4439 purports to fix. Is the premise of that bill correct, and how does this bill purport to fix it?

Let's talk for a second about the nature of uncertainty in the public trust field: The National Audubon case, quite appropriately, points out that the public trust doctrine, being a court-made doctrine, is inherently flexible in its application, and it's a doctrine that expands and grows as the public perception of environmental values expands and grows. It's not a fixed concept. Now, is this bad?

I would submit to you that this evolution and growth in public values and in environmental laws to accommodate and protect them is really universal. We find it in all of the important environmental legal regimes: The Air Acts, The Water Acts, The Toxics Substance Control Acts, and so on.

No less a sage on this subject than Professor Sacs, has, I think, a very illuminating statement on this issue of uncertainty that I always subject my students to, and therefore, feel entitled to subject the Committee to. Let me quote Professor Sacs, who says, "We must put aside the dominating idea that the legal system is to be designed, essentially, to institutionalize stability and security. Probably nothing is more urgently required in environmental management than institutions for controlled instability. Environmental law is principally needed to deal with the rapidly changing world, one of rising public standards. In such a world, the old idea of a stable and

predictable regulatory agency patiently negotiating solutions that will then be fixed and then unquestionable for years, or even decades, is hopelessly outdated. A mixture of legal techniques designed to destabilize arrangements that have become too secure is precisely what is needed for a milieu in which rapid change is the central feature."

We see this benefit of uncertainty, I dare say, reflected in the water ethic that's now called for in the Bay-Delta draft decision, something that I'll return to here, in a second.

With all due respect to Mr. Waters, I have to tell you that I think AB 4439 is a very bad way to deal with these problems of uncertainty, and I want to suggest a better way, in a moment.

It's not...

CHAIRMAN COSTA: ...Hold on a second. You just defined uncertainty as being good.

MR. THOMAS: I'm saying that, yes, I agree with the view that a certain amount of dynamic instability is to be regarded as a benefit in environmental law, not as something that ought to be avoided.

CHAIRMAN COSTA: Well, you may feel that way, but we live in a world -- I'm talking about our collective political world -- in which people like to expect a certain amount of stability in their lives from the smallest family unit to the larger aggregate of the world family. So, there may be certain benefits that you believe are accrued to this uncertainty; but, uncertainty all the time makes people feel uncomfortable.

MR. THOMAS: Yes. That's certainly right, particularly when we're dealing with the allocation of property interest. I don't disagree with that at all.

CHAIRMAN COSTA: Okay.

MR. THOMAS: But, what I do want to say is that the uncertainty is a product of an evolution in the public values in the environment, and that ought not to be cut off, it ought to be accommodated. And it's the accommodation that I want to talk about.

The problem, I think, from the standpoint of those who...

CHAIRMAN COSTA: ...I'm just wondering how you bridge the gap, I guess, because what Mr. Waters was attempting to do was to try to bring some certainty in a change in law...

MR. THOMAS: ...Sure...

CHAIRMAN COSTA: ...that created new questions, and you say the uncertainty is good. So, by the very nature, any attempt to bring certainty then, it seems to me, you would view as objectionable.

MR. THOMAS: No, I don't want to go that far. Let me do this: Let me talk about what I think are inappropriate approaches to dealing with uncertainty, and then suggest some that I think are more time-tested and productive.

I think what's not productive as an approach is to close the door to the decision-making bodies that are charged with making these reasonable allocation decisions -- which is a feature of this bill -- that those who seek to vindicate the public trust

really do find highly objectionable.

This bill would deny access to those entities that purport to speak for the public trust, instead delegating that responsibility to the Attorney General, but not requiring that the Attorney General actually act as the public's representative in these tribunals. The Attorney General is given the discretion to do so, or to not do so. In the event that the Attorney General decides not to act on behalf of the public, another layer of uncertainty is actually interjected, because what the bill does is then provide for a complex set of criteria, under which the Attorney General evaluates what group might step forward to speak for the public, and that is a decision that's made in an adversarial context where other groups that wish to be nominated contend. The decision is subject to judicial review. All others are excluded, no matter how strong their interest, or how serious their diversion from the selected public representative. I do think that this is out of keeping with modern conceptions of standing and of due process.

The other features of the bill may be even worse. It would seem to insulate consumptive water rights from any balancing with public values for periods of from 10 to 40 years. This possibly combines the worst features of each of the two approaches that I've talked about to protecting instream values. It, first of all, subordinates the public interest in public resources to those of the private use of resource interest. It also assures that adjustments, when they come, will come by large changes, not gradually, as the public needs are identified.

Finally, this bill imposes burdens of proof on the public trust that are likely to be insurmountable. The criteria, or the showings, that would have to be made, in order to have a public trust interest recognized, are quite severe. Taken together, they may amount to requiring the public representative to prove that the water right -- the consumptive water right -- is of negligible value, or could easily be replaced. So, it amounts to an allocation rule that makes it almost impossible for the public trust to be recognized.

CHAIRMAN COSTA: Okay. Why don't we move on.

MR. THOMAS: Okay. Let me talk about ways in which uncertainty, it seems to me, can and should be accommodated: The issue that we're dealing with here is really one of allocative justice. The problem is that a resource that was once abundant enough to allocate, on the basis of temporal priority, is now over-subscribed. How to apportion the scarcity is the problem that the Water Board faces.

The only possible answer is to convert from a legal view that recognizes users to one that recognizes uses. The public is not a user of water left in the stream; but, the need for water to support a complex of ecological resources is certainly a use, and certainly entitled to a share. It is too late in the political day to seriously dispute that proposition. The ad hoc reallocation does produce some uncertainty for those who have invested in facilities or enterprises in reliance on past allocations.

How can the law responsibly deal with the problem?

Well, the time-tested answer, I think, that comes from a variety of areas of environmental law, is to "divide the pie", holding in reserve enough to allow for future contingencies; that is, apportion public trust initially with sufficient quantities to meet reasonably projected expansion in the public's interest in a quality environment, and to accommodate new data on public trust resources and the degree of protection that they may require. Put another way, the burden of proof -- and therefore, the burden of uncertainty -- should lie on consumptive users.

I want to turn to the Bay-Delta proposal, and draw from that some object lessons to illustrate these points...

CHAIRMAN COSTA: ...All right. But, on that point -- before you leave -- you would then disagree with Mr. Littleworth's comment that public trust uses should also be included in a management approach? I refer to the comment that the California Water Ethic must also include the management of public trust uses, and that concept must embrace considerations that involve consumptive uses as a part of that management.

MR. THOMAS: It may be correct to say that the reasonable-use doctrine applies to all beneficial uses, consumptive and non-consumptive. That does not, however, in my judgment, mean that the fish and other public trust assets in the estuary -- for instance, in the San Francisco Estuary -- can be maintained simply through artificial devices, such as hatcheries, or, in the case of Suisun Marsh, overland water delivery systems, in lieu of water.

CHAIRMAN COSTA: How about when it comes to the

protection of a species of fish that's not native to California?

MR. THOMAS: It happens to be the case that the San Francisco Estuary is a highly-altered ecosystem these days. Most of the fish species are, in fact, introduced.

CHAIRMAN COSTA: California could fall under that category.

MR. THOMAS: That's right, but the important point is that it is still an ecosystem; it's still a functioning organic whole...

CHAIRMAN COSTA: ...There's no question...

MR. THOMAS: ...that's valued by the people, and it needs to be protected, whether those species be native are not.

But if I may, let me turn to some features of the Bay-Delta proposal...

CHAIRMAN COSTA: ...Since we've touched upon that, please go ahead.

MR. THOMAS: The question really is whether or not the Board, or the staff of the Board, in proposing the water quality plan, indicates that there is a crisis in the application of the public trust doctrine that ought to stimulate action by the Legislature. And I would submit that, quite the contrary, this is not the case.

The plan considered five alternative levels of protection for the public trust resources, ranging from optimal levels suggested by the testimony, to a no-action alternative, where nothing at all would be done. It actually recommended a middle judicious course. That course reflects no change in the

average annual level of exports from the estuary. That's worth repeating: No diminution in the level of exports from the estuary. Now, this is to be compared with what the evidence, the Board acknowledges, indicates would be the optimal level of protection of the public trust resources. That would have required delta outflows of more than 7 million acre-feet, in addition to those that have been historically experienced.

So, in other words, the public trust resource in this decision is giving up some 7 million acre-feet over optimal protection to accommodate the very concerns that generated AB 4439. It would require an increase in delta outflows for April through July, through conjunctive use of service and ground water, and re-operation of the Central Valley Water facilities.

It does set flow standards; but, these flow standards are set only to protect salmon and the striped bass fishery. Moreover, the level of protection is not sufficient to restore the fishery to its pre-project levels. The reason is that, to do so, would require increases in San Joaquin River flows, such that some existing consumptive uses would have to be curtailed. This does not appear to be reasonable, says the decision. In other words, the balance is struck, such that optimal consumptive uses are preserved, in order to preserve a sub-optimal flow for the public trust resources.

The decision also retreats from the level of protection provided in the earlier 1978 decision, it appears, for Suisun Marsh, that D-1485 prescribed a measuring point in the Western Marsh that provided substantial benefits to the tidal marsh. This

new opinion does not incorporate that.

The decision does acknowledge the need to take a global view of the estuary in keeping with the Racanelli decision -- that is to say, to consider protection, not just for the Delta, but for San Francisco Bay itself. But, significantly, in the end, the Board declines to set standards to protect the Bay, notwithstanding extensive testimony on the public trust values of the Bay. The information presented, this decision says, did not provide an adequate connection between physical changes in the Bay, due to inflows and beneficial uses in the Bay. The evidence presented was judged insufficient, as a basis for a water quality objective. Further studies should be performed to address these concerns.

Well, the decision does a couple of other things that are notable: It redefines the "water-year" classification in such a way that less water would be provided in the second of two "dry years" to the estuary, which may create a problem with the resiliencies of the living systems there to respond to two "dry years" back-to-back; and, notably, it provides for a water conservation ethic for the consumptive users.

This water conservation ethic assumes a modest degree of water conservation, about four percent of existing consumptive agricultural uses in the area receiving Bay-Delta water. From efficiency improvements alone, it does not consider cropping changes, or retirement of marginally productive agricultural land, and it does not consider the effect of price reforms.

The efficiency improvements would cost between $25 and

$40 per acre-foot of water conserved. This may be far less than the cost-effective conservation potential, considering either marginal cost of new supply, or the market value of salvaged water, the point being that the Water Conservation Ethic that's called for is to be regarded as an important new development, but probably far from the degree of the amount of water conservation potential that exists in export water.

The one thing that the Board did correctly, in our judgment, quite clearly, was to recognize that there are public trust values in the estuary that go beyond simply protecting the fish and the fishery. It did, at least, implicitly recognize that the entire life-support web, if you will, is a part of the protectable public trust resources; but, in the end, it declined to articulate standards for any of the resources, other than the fish, because it found that there were significant, scientific uncertainties in the record.

Having taken as much time as I have, I guess I simply want to close with the observation that this Board, in dealing with uncertainties, essentially took the kind of conservative approach that I think would please the water contractors. Well, the evidence was less than convincing: It did not articulate standards; it certainly did not take away water from consumptive users.

I think an argument can be made -- and probably will be made, in Phase II of the proceedings -- that in circumstances like this, a way of building certainty into the allocation of water rights is to proceed by resolving uncertainties in favor of

protection of the public trust resources, and to build into the standards, as they're set, an ample margin of safety. In doing that, the Board can avoid exactly what has been indicated as a concern. It can avoid the prospect that the same water rights will have to be revisited years later, and once again modified, when either the public perception of environmental values has changed, or new data comes in, indicating that levels of protection need to be increased.

CHAIRMAN COSTA: Mr. Thomas, thank you.

I'm going to give you an opportunity to correct yourself, if you so desire. You made references toward the Board, in terms of the recommendations that have been made in the first phase. As I read it, it is the staff that has made recommendations in the first phase. The Board has not determined yet how they choose to act upon those recommendations. You seem to use those interchangeably, and I don't know if that was your intent or not.

MR. THOMAS: Your point is well taken. I believe that's technically correct. It may be said in this case, however, that the Board itself, apparently, has engaged in quite a number of closed session deliberations on the evidence, and I surmise from that that this document reflects, to a considerable extent, the views of the Board members, as well.

CHAIRMAN COSTA: That may or may not be the case.

MR. THOMAS: We'll soon know.

CHAIRMAN COSTA: We will soon know on Phase II. I think you're correct on that point.

Mr. Waters has a comment he'd like to make.

ASSEMBLYMAN WATERS: It's not a question; it's a statement, Mr. Chairman.

First of all, I want to thank you for holding this hearing today. I don't think there's any doubt as to the importance and the intensity of this issue. It has been debated, over and over again.

I should tell you that I introduced this issue last spring, knowing full well that it would create somewhat of an emotional response, and I certainly was not disappointed in this. My purpose, however, was to raise the issue, and the importance of this issue, to all of those interests that are out there. And believe me, there are a lot of them out there who recognize that the water right challenge procedures, under the public trust doctrine, needed some review and some reformulation, if you will. There are some flaws in there, and we certainly need to recognize the need to provide those public agencies with some element of confidence and certainty that, once approved and permitted, those projects can operate as planned, at least through their repayment period. That's an important statement, because you can leave someone high and dry out there. I don't know how you can expect people to build projects under circumstances that now exist.

It is an important issue, and certainly, we need some certainty in that water rights loss, so that these repeated -- or these very frivolous -- claims do not jeopardize public financing for these projects.

And in doing this, we definitely need to ensure that the

spirit and intent of the public trust doctrine is upheld. I have no argument with that, but if we don't resolve a way to do this satisfactorily, the taxpayers are the ones who are going to lose out. Clearly, they're going to lose by having to pay the public financing for a water project without planned water and power revenues when a water right is limited by such a public trust claim.

I feel very strongly that the protection of public tax dollars that are invested in a water project, and the protection of the financial integrity of our local governments and other public agencies, need the same equal consideration as an element of the public trust, as do the water rights issues.

And, Mr. Chairman, again, I just want to thank you for holding a hearing on this very controversial issue. Again, I think that when I introduced this bill, I didn't expect it to fly right out of here. It does need a lot of work, and I would certainly ask your help to possibly refine this bill, to make it workable in some way, where we can, indeed, protect those people who have made these investments in a project. That's the part that bothers me -- again, the taxpayers of this state will be the ones who are going to suffer. We've got to somehow eliminate all of those frivolous claims that are being applied. If you have some ideas, I'd sure like to hear about them -- from all of the witnesses.

I want to thank the witnesses, too, on behalf of the Chairman, for coming here and trying to unravel this very complex issue.

MR. THOMAS: The one thing I might say about that, if you'll permit me, Mr. Waters -- perhaps, I didn't say it as clearly as I wished to, in my testimony -- is that, if you look at the Bay-Delta proceedings as a indication of whether or not there is reason for concern about investments and public facilities being frustrated through application of the public trust doctrine, the conclusion that you have to draw is that there's no problem that needs to be fixed. And what I would suggest to you is that...

ASSEMBLYMAN WATERS: ...I think you'll get an argument on that, sir.

MR. THOMAS: Well, we'll be arguing about it during Phase II and Phase III of these hearings. But, at least, until there has been an opportunity to engage in that argument, I certainly think it would be premature for the Legislature to move, particularly with a bill as draconian as this one.

CHAIRMAN COSTA: So, you're saying, in effect, that we should not take any action for two years.

MR. THOMAS: I say that what the Legislature should continue to do is monitor the applications of the public trust doctrine.

CHAIRMAN COSTA: You're saying that we should do nothing for the next year or so. We do that well.

MR. THOMAS: Including in this context. And it may be that there will be no need to move for much longer than two years, if at all.

CHAIRMAN COSTA: Well, that may be. I would say that

there are a lot of folks who are concerned out there -- people who have appropriative rights -- with the staff's recommendation in the first phase. And to say that that doesn't exist, I think, ignores a lot of public sentiment that's taking place out there.

Mr. Littleworth, you had a statement or a comment you wanted to make.

MR. LITTLEWORTH: Let me just respond to the last point that Mr. Thomas made about the fact that we haven't seen any problem in this uncertainty field, and have facilities which aren't being used.

This staff plan now gives Southern California 770,000 acre-feet of water. We hold, in Southern California, state water contracts to 2.4 million acre-feet of water. So, basically, we're getting about a third of what that project has been built for; that's really to say that that investment is wasted, and it never should have been built that way -- a tremendous impact on the project, if this were to stay the way it is now proposed.

But, I think there are some real problems in the application of the staff recommendations. Here, the staff is, I think, using other reasons to reach -- other legal reasons to reach -- these large allocations for instream flow; but, you could try to reach them through the public trust doctrine, as well. But, whichever way you get, there are some real problems with facilities and projects which have been built -- and bonds are out there -- and so forth. And there certainly ought to be some stability to protect the fiscal integrity of those projects.

CHAIRMAN COSTA: Some would argue, Mr. Littleworth, that

one of the jobs of the Board is to balance -- if I understood you correctly.

MR. LITTLEWORTH: Yes.

CHAIRMAN COSTA: Many of my environmental friends would argue that all of the balancing thus far has been on the back of the environmental resources, without much attention being addressed toward those resources. How would you describe that balancing as needing to take place?

MR. LITTLEWORTH: I'm aware that they believe that the environmental resources have not received a fair share in the past, and that's the reason that we ought to roll things back, so to speak. If you look at the evidence in that case, though, I think two things are apparent: One is that you can do a lot to improve salmon, without large amounts of water, and without the enormous spring flows. When you can accomplish the same kind of result, more economically, in terms of water usage, it seems to me that that has got to be part of our system.

Secondly, if you look at what we're going to buy for our money with the high spring flows for striped bass, there's really very thin evidence that we're going to get very much for it. The only place where there was much agreement about striped bass, is that we would improve the situation, if we built some facilities in the Delta; if we did that, everybody seemed to agree, there would be improvement. It wasn't in large flows, but it was, really, that the consensus of the evidence was more in terms of accomplishments through facilities.

ASSEMBLYMAN WATERS: If we would build a full-service

Auburn Dam, that would help too, wouldn't it?

MR. LITTLEWORTH: That would help.

ASSEMBLYMAN WATERS: I had to get that in, Mr. Chairman.

CHAIRMAN COSTA: I know you had to get that in. I knew you were looking for your chance.

Gentlemen, would you please stay here?

I'd like to have the other two parts of the panel -- Mr. Walt Pettit and Mr. Bob Potter -- come up before us, to give us some public policy perspective.

Walt Pettit is the Chief of the Division of Water Rights for the State Water Resources Control Board, a group of folks who have been much in discussion this morning. You'll be speaking as the Chief of the Division of Water Rights.

MR. WALT G. PETTIT: That's true, Mr. Chairman.

CHAIRMAN COSTA: You'll make sure to reference when we're talking about staff, and when we're talking about the Board.

MR. PETTIT: I'll try and keep that very clear. That's an issue I'm faced with constantly.

Mr. Littleworth and Mr. Thomas have already made a number of the points that I was going to make...

CHAIRMAN COSTA: ...Good, you can go right to the heart of it, then...

MR. PETTIT: ...and I guess it's significant, the extent to which we agree with them both. I've passed out some written copies of my prepared text, and I'll try and go through it as quickly as I can.

The Board has implemented policies which have also

served to implement the public trust doctrine for many years. In specific regard to the Bay-Delta, the Court of Appeal in the Racanelli decision said that the Board, in its 1978 decision, complied with the public trust doctrine, as described in the Mono Lake case, even though the Board didn't refer to the public trust -- and the decision was five or six years before the Mono Lake decision.

We believe that the previous decisions, with respect to the Delta, have also complied with the public trust, although they relied on other legal theories. The point that I'd like to make is that the public trust does not add significantly to the Board's authority to put terms and conditions on water rights permits and licenses.

CHAIRMAN COSTA: I see you agree with some of the earlier statements that, if there were not a public trust doctrine today, you'd still be contemplating the same decisions.

MR. PETTIT: Yes. And like the requirements, under some of the existing statutes, the public trust also requires that the decisions be balanced and reasonable, in light of the particular circumstances.

Some of the other laws we've applied in the past include the provision that's about 30 years old now, that recognizes fish and wildlife as beneficial use, and requires protection of those uses in decisions. The protection of the public interest is a long-term activity of the Board in its decision making.

Since the early 1970's, the California Environmental Quality Act has required a consideration of alternatives that is

very analogous to the public trust balancing. The constitutional prohibition against waste and unreasonable use has also been in effect since 1928. And because of that prohibition against wasteful use, we have routinely included a continuing authority term in water rights permits and licenses. The Board also reserved jurisdiction and permits in many cases -- Mr. Littleworth alluded to that earlier -- to make amendments, particularly when certain aspects of the situation are unknown at the time the permits are issued. Those reserved jurisdiction terms are dropped when a permit is licensed.

Under the public trust, we consider that the state is a trustee. When it makes a decision concerning public trust resources, it must balance those resource values with the developmental interests and protect the resources, if it's feasible and reasonable. The Board deploys the public trust to projects involving navigable waters -- projects which could affect navigable waters -- and the fisheries.

About the only major change attributable to the Mono Lake case and the elucidation of the public trust doctrine is that people can now petition the Board to undertake statutory adjudications to include consideration of public trust resources. Many people have suggested that before the Mono Lake decision, established rights were untouchable. However, the Board has retained continuing authority, as I mentioned a moment ago, over the water rights permits and licenses, to modify them in the interest of the public welfare, to prevent waste and reasonable use on reasonable method of diversion.

I have included, as Attachment 1 to this write-up, a copy of the Board's current continuing authority term. This version includes language, and it is intended to comply with the requirements of the Mono Lake case. It's included in all new permits and licenses, and it's inserted in permits and licenses that have an older version, whenever they come up for review for any other reason.

In practice, the Board has not yet modified a water right, solely on the basis of public trust authority. We've responded to a number of complaints that were filed, which sought greater protection for fishery resources, and typically, they cite public trust as one of the bases for the Board action -- or potential bases of board action. Some of these cases are still ongoing; others have been concluded. But, the actions taken, to date, have been based upon agreed-upon solutions, or continuing jurisdiction, to modify terms that were included in the original permits. As I stated before, other bases exist for taking the same actions as the public trust doctrine requires. And I believe the specific situation, with respect to the Bay-Delta, is pretty much the same as the general situation I've just outlined.

In handing down its decision on the Delta water right cases, the appellate court -- the Racanelli decision -- said the Board had done a couple of things wrong or incompletely in its 1978 decision. For example, the Court said that the Board had to adopt water quality objectives that reasonably protect all beneficial uses of water, whether those objectives can be met entirely through conditioning water rights or not. This point is

based on water quality statutes, not the public trust.

The Court also said that the Board should make all water rights holders share the burden of meeting the objectives, not just the Central Valley Project and the State Water Project. Therefore, the Board has vehicles for modifying Delta requirements. The existing permits of the state project and the federal project were heavily conditioned when they were issued, because there were a lot of uncertainties and a lot of ongoing studies.

It's unlikely, at this point, that the next Board decision on the Delta will impose any conditions that have to rely solely on the public trust. And I was going to give you a status report on a couple of reports we've released fairly recently, but I think you've probably already heard about them.

CHAIRMAN COSTA: I think we're familiar with those reports. Speaking of those reports, I have a question: As you stated in the last page of your statement, in the first paragraph, the Court also said that the Board should make all water rights holders share the burden of meeting objectives, not just the federal and the state projects. My reading of the November 3 salinity report talks about cutbacks to correct reverse flow problems, as it relates to salinity in the Delta, and improving fisheries, particularly striped bass and salmon. My reading of that is that the changes in flow patterns, those in which there would not be pumping from certain periods of the year, and such, affected, principally, the CVP and the State Water Project. But, in reading your statement here, it seems that you're saying that

the staff is recommending reduction in flows for everybody who has their spigot out there. Would that include municipalities and others who have water rights? I haven't read that into the report, and I'm just wondering. Maybe I've overlooked something.

MR. PETTIT: It could. I think that's what remains to be seen. But, the thrust of the recommendation -- and we think it's necessary to comply with the appellate court decision -- is that this burden be spread much more broadly than it has been in the past. And the example might be the upstream "diverters", particularly the upstream large storage projects of the other entities -- either municipalities, irrigation districts, or prior rights holders -- who have built facilities in both the San Joaquin and Sacramento Valleys, and who presently have no obligation to meet any Delta standards at all.

CHAIRMAN COSTA: Yes.

MR. PETTIT: And we considered that the Court told us that we have to look at the possibility of assigning some of that burden to those...

CHAIRMAN COSTA: Well, that seems only fair. Right?

MR. PETTIT: It seems to be. The recommendation and the quantities of water that you alluded to...We made no attempt, at this time, to define where those quantities of water come from. In the Sacramento side of the system, for example, if the responsibility were apportioned, on some basis, throughout the entire Sacramento Valley, other folks would have to help the Department of Water Resources and the Bureau meet those spring flows.

CHAIRMAN COSTA: And the same on the San Joaquin.

MR. PETTIT: The same on the San Joaquin side, on the Tuolumne, the Stanislaus, the Merced, and some of those other rivers. And from our standpoint, that's a Phase III issue. All we've done, at this point, is to take a preliminary look at it, to see if it's within the realm of possibility that those kinds of flows could be produced.

CHAIRMAN COSTA: So, you've had your folks there in the "think tank", or with their computer model, trying to figure out how you could work these flow patterns out to achieve the objectives, but you haven't made any determination, actually, where that would all come from, or whose contractual rights you would be amending.

MR. PETTIT: That's correct. We went far enough to be comfortable, but it looks like there's a good possibility that could be done. But, as was referred to a few minutes ago, I think we all got comfortable, to the point that this report was released as a staff report for consideration. The Board certainly has not bought off on it. And we, frankly, need the feedback in Phase II, as to how feasible some of these alternatives are.

CHAIRMAN COSTA: Okay. Well, I'm glad you clarified a few things for us.

Why don't you have a seat, Mr. Pettit, and we'll have Mr. Potter, Deputy Director of the Department of Water Resources, speak briefly on the public policy perspective, now that it has become crystallized in everyone's mind, as to what we're really dealing with, as we discuss the public trust doctrine and how it

fits the Bay-Delta proceedings before the State Board.

MR. ROBERT G. POTTER: Thank you, Assemblyman Costa.

The Department is not prepared to make any sort of comprehensive response to the staff draft plan, at this point, and it will probably be some time before we can make a comprehensive assessment. So, what I'll do here, this morning, is to simply make some observations on the report, and I might note that I did spend a good part of a delightful weekend wading through the 330 pages and eight chapters.

CHAIRMAN COSTA: It makes for delightful reading.

MR. POTTER: I don't purport to understand it; but, I can say that I've read it.

The report significantly and comprehensively overhauls the D-1485 plan -- the existing plan. It makes major changes in Delta outflow, major changes in Delta export limitations, and provides, as was mentioned earlier, a large block of water in the spring for fish. There is a whole additional series of complex water quality criterion that are set forth in the plan and flow objectives. Operational objectives, such as the plan, basically, take over operation of the Bureau's Delta Cross Channel gates, as near as I can determine.

CHAIRMAN COSTA: Who takes over the...?

MR. POTTER: ...Well, the plan purports to radically modify the way those Cross Channel gates have operated, historically.

CHAIRMAN COSTA: The federal government, under the COA, recognizes the state's ability to set those standards -- and the

Board to set those standards. Is that not correct?

MR. POTTER: Yes. All I'm saying is that this goes a step beyond standard setting. There's a whole series of flow objectives; there's a whole series of water quality objectives -- new objectives in every beneficial use -- that the Board attempted to protect here, including specific recommendations on physical operation of the Bureau Cross Channel gates. And it will be a long time before we have an in-depth assessment of whether all that's doable. As you heard Mr. Pettit say, other people are obligated by the plan; but, the plan does not describe in any way how those other operations will be affected. As a consequence, it's difficult, if not impossible, for us to translate some features of the plan back into impacts on the State Water Project.

It may be that the plan is not physically or economically feasible, as we evolve through a process of trying to see how it could be implemented. And it's certainly going to require a major, substantial effort on our part -- federal government, and every major water operator in the basin -- to determine just how the plan would be translated into actions.

The plan does ignore a large percentage of the Department's recommendations that were put forward in the planning process -- although not all of our recommendations. And the plan certainly paints a different picture of the future than does our Bulletin 160-87, released at the end of 1987, which is the update of the California Water Plan.

Some of the major issues, you've heard about; but, I'll go back over them: The plan purports to hold to a 1985 level of

annual exports from the Delta level, through the year 2010. At the same time, it greatly reduces exports in the spring and summer region time-frame, which is, of course, why you build a water project -- to provide spring and summer flows.

It assumes a 1 million acre-foot reduction in agricultural demand, between now and the year 2010, which is a substantial departure from our planning documents. It assumes a 1.4 million acre-foot per year increase in urban conservation and reclamation by the year 2010, which is also a major departure from the future. The recommendations in the staff plan would require a total "re-operation" of all the major reservoirs in the Central Valley Basin, and extensive new conjunctive-use initiatives.

CHAIRMAN COSTA: Would you go as far to say that it includes, not only those reservoirs that are currently being operated by the state and the federal entities, but those that are being operated by municipalities, as well as local water districts?

MR. POTTER: The draft plan certainly says that, and suggests that, as an initial undertaking...And there are about 31 reservoirs, if memory serves me correctly, that are over 100,000 acre-feet of capacity. The plan suggests that that may be the place to start -- with that list of 31 in the Central Valley reservoirs.

As I said, it's not at all clear to us that the objectives of the plan can be accomplished. It certainly depicts a greatly different future -- water future -- than we had in our last planning document.

CHAIRMAN COSTA: On that point...I know you just read it over the weekend; I haven't had a chance yet to "sink my teeth into it"...If an entity municipality had three or four reservoirs, none of which were 100,000 acre-feet, of which the three or four combined to total, say, 200,000 acre-feet, would those be included, for the purposes of the staff's recommendation?

MR. POTTER: I don't think that you can read a "Yes" or "No" answer to that question into the plan. As I recall, having read it, they simply suggest that they need to work their way out into those other reservoirs and make the observation that there are 31 of them that are in excess of 100,000 acre-feet of storage capacity.

I guess the main thing that I'm suggesting is that either a continuation of the phase of this planning process that we've just come through, or a substantial lengthening of the next phase of the process, is inevitable in my mind, for the water community to begin to sort out the implications of the plan. It's intuitively not at all obvious to me how we remain whole, in the State Water Project, if we are in fact to reduce our April to July diversions by something like three-quarters of a million acre-feet -- our share of the Delta diversions.

CHAIRMAN COSTA: If you reduced your share by as much as is being recommended by the staff...You said, three-quarters of a million acre-feet...?

MR. POTTER: ...That's approximately the number; I think it's 670,000 acre-feet...

CHAIRMAN COSTA: ...Have your folks over there in the

Department been able to do any quick math on a calculator to find out whether or not you could continue to pay for the project?

MR. POTTER: Well, the way that our contracts work, we get paid, whether or not we deliver full entitlements. Unfortunately, it just means that the price of doing business has gone up by a factor of several fold, I would assume, to our water contractors. We collect on a basis of the facilities' investments we've made, regardless of whether we deliver the water.

CHAIRMAN COSTA: So, the price of the water would simply increase?

MR. LITTLEWORTH: There is, ultimately, a taxing power, behind the state contracts, to prevent a default.

CHAIRMAN COSTA: So, you'll be able to remain whole, one way or the other?

MR. POTTER: I don't know what happens when the State Project moves beyond the point of its customers' feeling that they don't have the capacity to pay. Hopefully, we'll never come to that point. But, we have the institutional mechanisms in place to remain whole.

That's really about all I had to say, this morning. I do think that it's going to take a long time to sort all of this out.

CHAIRMAN COSTA: Has the Department made any statement, in the last year or two, on the public trust doctrine?

MR. POTTER: I'm sure that we have, in one context or another; but, I can't recall a specific lengthy presentation on that issue. We've been, of course, very aware of the existence of

the doctrine, and keenly interested in the evolution of the public's reaction to it and, of course, the water community's reaction to it.

CHAIRMAN COSTA: Well, the reason I asked the question is because you have produced the bulletin in late-1987, which you referenced,...

MR. POTTER: ...Yes...

CHAIRMAN COSTA: ...and others, which represent the Department's basic water management plan, to provide water supplies to all of the various regions of California which you serve. I'm wondering if any of those bulletins have been issued with the idea of the public trust doctrine in mind, or the Racanelli decision, or contemplating any of the other changes that create the flexible environment that Mr. Thomas described.

MR. POTTER: There are a series of brief discussions in 160-87 on most of those issues. There was an interesting quote here, this morning, and I certainly can't bring it back; but, if I were to try to describe the water industry, as we perceived it two weeks ago in the Department of Water Resources, we believed that there was enough certainty in water rights, and certainty in the water field, that we could work our way through the regulatory process, through negotiations and a step-by-step process, to advance the project in a balanced way. I heard one quote this morning that that was not an appropriate approach.

CHAIRMAN COSTA: Well, "certainty" didn't seem to be a term that Mr. Thomas indicated was necessary to...As a matter of fact, the opposite of "certainty", it would seem to be...He, at

least, indicated that it might be preferable. He was talking about environmental law; I don't want to take it completely out of context.

MR. POTTER: Well, just one observation, on that area...I don't know what this will mean, long-term; but, we spent a long time in the Suisun Marsh, negotiating over what we were going to do there. We ended up, after several years of negotiations, with a document that was signed by my Department, the Bureau of Reclamation, the Suisun Marsh Resource Conservation District, and the Department of Fish and Game, and clearly, we thought it represented a good, negotiated response to protecting the Marsh and protecting the project.

CHAIRMAN COSTA: It was an agreement that everyone signed off on.

MR. POTTER: It was an agreement that everyone signed. The Board saw fit to, basically, modify that agreement, within this decision, which has some interesting implications for the future.

CHAIRMAN COSTA: Which brings me to my two last questions: First of all, not only under the most recent bulletin, which the Department has issued, but in my discussions with Director Kennedy and others who have been involved in the last years, you've attempted to set forth a policy that has dealt with improving water quality in various regions of the state, while improving the supply at the same time. You have a step-by-step approach that deals with facilities, not only in the Delta, but elsewhere in the state -- the Kern County water banking facility

and others, to name but a few. I'm wondering, with the staff recommendations that were issued two weeks ago, how you viewed the recommendations, in comparison to the Department's attempt to establish a step-by-step approach, to provide water resources for the long-term needs of the state.

MR. POTTER: I, personally, would believe that the strategies and approaches we've used historically are appropriate, and will be appropriate in the future.

The point was made earlier this morning, as to whether or not people were willing to invest in an environment of added uncertainty; I think that's the key. If we lose the confidence of our water users -- that we understand our system, that we know what it's capable of, and that we know what the benefits of adding an increment to the system will be...If we lose their confidence in that process, then the uncertainty has set us back greatly; if we don't, and people can come to grips with living on a "playing field" that's kind of "mushy", then I think that the processes that we've used will continue to be the appropriate approach to advancing the state's water delivery system.

CHAIRMAN COSTA: Could you implement the Board's staff's recommendations today, and still proceed with your step-or-step approach, without making any changes?

MR. POTTER: I'm at a point where I don't know what our system is capable of, right now. I think we'll be at that point for a substantial period of time. Until we work our way through that, I don't know that I could answer that question with any certainty.

CHAIRMAN COSTA: This is the last part of that question: It seems to me that we have two "arms" of the state government that have complementing responsibilities; both deal with providing the proper management and the protection of our water resources, and attempt -- in spite of what uncertainties exist -- to plan for the long-term needs of the people -- not only those who live here today, but the people who we project will live here in the next 50 years. It seems to me that it has become very obvious in the last two weeks that these two different "arms" of government don't seem to be communicating very well with one another.

Might you have any suggestions, as we look upon Phase II of this process, as to how the Department and the State Board, as well as the Department of Fish and Game, and others, could communicate better? It seems to be that "the right hand doesn't know what the left hand is doing." Am I incorrect in making that statement?

MR. POTTER: I wouldn't touch that...(LAUGHTER)...I guess what I would...I heard you ask for a suggestion, as to how we could better communicate...midway along...(LAUGHTER)...

CHAIRMAN COSTA: ...Yes, I think that was the question...(LAUGHTER)...

MR. POTTER: ...I guess the one thing that I would say is that this plan that we have in front of us is a series of assumptions, goals and objectives; nowhere in it is there any analysis that demonstrates that what is there is attainable. I would think that, because of that, the next process -- whatever the next step is -- is going to take a lot of time, and there's

going to have to be a lot of detailed, specific discussion of numbers, to bring us to the point where we have any understanding of what the plan really means. I'm not sure that what's there can be accomplished.

CHAIRMAN COSTA: Well, I'm not sure of that, either; but, I think that it's very important -- and I intend to talk with the Director -- that the Department begins to talk with the Board. I don't know to what degree you're engaged, at this point; but, the hearings start in less than two months...Is that correct? And we're talking about an issue of tremendous importance to everybody in this state, whether you're an environmentalist or a fisherman, or a farmer, or a person living in the city. These staff recommendations are going to have a tremendous impact, as they relate, not just simply to the public trust doctrine, but to how we try to provide a sound public policy, and attempt to manage our water resources in this state.

It doesn't seem like all of the agencies that are responsible for dealing with this issue are working as closely together as they might.

MR. POTTER: Well, we...

CHAIRMAN COSTA: ...I realize that there are different roles, and I realize that there are specific proprieties, in terms of how this matter is handled; but, we're still talking about attempting to work together with all the parties who are involved in this issue.

MR. POTTER: I certainly agree. We were full participants in the process that led to the plan that is here; we

didn't have as much influence as I would like to have had...(LAUGHTER)...We won't "pick up our marbles and go home"; we'll be there.

I do believe, though, because of the lack of specificity of the plan, in terms of demonstrating its impact on water systems, or demonstrating how an operation could achieve what's there, that the whole thing has got to slow down. I just don't think we're going to get there by April, in terms of being able to definitively describe the impact of all of this. I'm not certain, from what I've heard here today, that the Board has done anything that would be what I would consider engineering operations that would demonstrate that the thing works.

CHAIRMAN COSTA: Very interesting.

Any other comments, by any of you gentlemen? Members of the panel, this is your last "crack" at it, now.

MR. PETTIT: Mr. Chairman,...

CHAIRMAN COSTA: ...Yes...

MR. PETTIT: ...I would like to comment on a couple of things.

There have been a number of statements here, as to what the plan does and doesn't do; I don't think this is the forum in which you would like to get into an argument on that issue. A couple of the things, I think, do represent some misunderstanding; but, there are a couple more general points that I'd like to make.

Mr. Littleworth, for instance, suggested that the proposed "water ethic" be amended -- or expanded -- to include a reference to the fact that the public trust considerations need to

be balanced and reasonably met, along with all the other uses. I guess from my standpoint, looking back at it, I think the staff -- and I think I can speak for the Board, for certain, in this issue -- certainly agrees to that. That may have been so obvious to us, that we didn't put it down; but, we think that all of the beneficial uses, including the public trust uses, have to be subject to that kind of balancing, and have to meet the criteria of reasonableness.

With regard to effects on the integrity of the projects, I think that's why I mentioned earlier that the staff is very interested, and needs to get the feedback from the parties in the Department, because there wasn't any way that we could, with the kind of precision we would like, assess the implications of all these recommendations. We need that feedback to decide what's feasible, and what isn't feasible. I cannot envision the Board adopting a plan that destroys the integrity of the projects; for what that's worth, I'm comfortable with saying that, on behalf of the Board.

I think that we certainly have no desire to destroy this step-by-step process that the Department and others have been going through. The Coordinated Operations Agreement, I think, is a vital component of the state's water planning...

CHAIRMAN COSTA: ...What about the Suisun Marsh Agreement that was reached?

MR. PETTIT: We changed that, in one respect; that's something that we'll have to look at. We accepted the Agreement -- or, recommended acceptance of the Agreement. We, in effect,

changed the "water-year" criteria, to make it consistent with the other "water-year" criteria. The effect of that is that there will be less years that are declared "dry years", and less times that the "dry-year relaxations" would come into play.

So, in one sense, the Agreement was accepted; but, in essence, it will put an additional burden on the projects, because of the change in "year-type" criteria. That's something that is another factor -- or, another issue -- that the Board will have to consider, whether it's worth disrupting the Agreement, at all, for that gain, or not. The staff's initial reaction was that the "year-types" ought to be defined the same for all the uses, and all the factors. That Agreement had a different definition in it.

With respect to the time schedule, I alluded earlier to the fact that many of these issues...The allocation of responsibilities can't be decided, until Phase III. With the kinds of things that would have to be put into place, if this plan is adopted, I anticipate that this is going to be a multi-year process; it will be well into the 1990's, before water rights changes could actually be implemented -- to implement this plan.

After we get out of Phase III, if we assign responsibility to a number of other projects, there are going to have to be some implementing mechanisms designed that are nowhere near in place now. So, it's going to be a long-term effort, if it proceeds along its present path.

CHAIRMAN COSTA: Am I to understand you, correctly, that the staff plan is a working document for the purposes of Phase II to solicit response from the various affected parties, as the

Board begins its hearings in early January?

MR. PETTIT: Absolutely. We think there are a number of issues that had to be out there on the table. Salmon was mentioned earlier, and it's a very good one; I could go into some detail on our salmon recommendations. There are two or three policy decisions inherent in the salmon recommendations, that we've gone down one path, in the staff report. There are a couple of other ways that are strictly policy decisions -- for instance, hatcheries versus natural salmon populations -- that could turn that recommendation in a different direction. So,...

CHAIRMAN COSTA: ...So, you think that the Board will look at this as a working document, which they will attempt to solicit further input from, when they begin their hearings in January?

MR. PETTIT: Well, I...

CHAIRMAN COSTA: ...That will be modified and changed?

MR. PETTIT: I'm more than convinced that the Board will be looking at all these recommendations, and has accepted none of them as "cast in stone".

CHAIRMAN COSTA: Okay.

Any other comments, Members?

We have one last witness. Thank you very much for your time and patience. Our last witness, before we break for lunch, is Mr. Howard P. Marguleas, who is the Chairman of the California Chamber of Commerce. He will speak on his concerns as they relate to the public trust doctrine, specifically, as they relate to Mr. Waters' AB 4439.

It's good to see you, Mr. Marguleas. How are you doing?

MR. HOWARD P. MARGULEAS: Thank you.

I apologize for being late...

CHAIRMAN COSTA: ...I have plane problems from time to time, myself; so, I understand what you're going through. We're glad that you're here.

MR. MARGULEAS: Good morning, Chairman Costa, and Members.

My name is Howard Marguleas. I am the Chairman of the Board of Directors of the California Chamber of Commerce, and the Chairman and Chief Executive Officer of Sunworld, International.

We appreciate the opportunity to explain why we co-sponsored AB 4439, with the Association of California Water Agencies.

John Fraser, the Executive Director of the Association of California Water Agencies, is with me this morning, so that we can jointly respond to your technical questions on the public trust doctrine.

We understand the environmental concerns involved in this issue, and agree with the importance of protecting California's natural water ways, wildlife and fisheries. There are still, however, several major reasons why we ask that AB 4439 be introduced: One reason is to tell the public in hearings, such as this, that the public trust doctrine represents a real threat to water supplies for our cities, our industries and our state's agriculture, an industry which economically touches one out of every three of us. It also creates uncertainty as to whether we

can expand our water supplies. Legislation is needed to restore an element of certainty for the public's water supply.

Let me break down the problem between existing and new water supplies: Water development systems are not unlike our transportation systems; they are expensive, expected to last decades and they are paid for largely through user fees, whether it be a gas tax or a monthly water bill.

If an environmental organization brought a lawsuit to shut down a major freeway, because there was too much noise and pollution, it would not be unlike public trust claims against existing water rights. If either claim were successful, there would be a catastrophic loss to the entire state's economy. New highway routes and water supplies would have to be found. The problem would be more serious for the water infrastructure, however, since replacement water would not be available -- or it may not be available.

The only solution to a successful environmental claim against an existing water project may be rationing. I'm sure you will hear about rationing alternatives for existing water systems in your panel discussions, later in the afternoon.

My next point deals with developing new water supplies to meet population and economic growth. The public trust doctrine says there are no vested water rights, upon which a community can rely. Any existing or new project is fair game for an environmental lawsuit to take away the water right at any time.

I will go back to the freeway analogy: Would anyone seriously consider financing and building a new freeway if

opponents could file an environmental lawsuit and succeed in closing that freeway after it's built? If only a possibility, the decision-makers would have to seriously consider their potential liability for prudent use of public funds.

For new water projects, uncertainty is the problem. How can we build a canal, enlarge Shasta Reservoir, or build Auburn Dam, if a new court interpretation of the public trust doctrine, 10 years from now, requires the release of that water to satisfy new environmental claims.

The uncertainty of when a public trust claim will be made, creates a unique problem for financing new water systems. For most water projects, bonds are issued; financial investments are consequently made. The public trust doctrine will then make those investments become enormously risky, with two consequences: The cost of money will either go up, or the money will not be available at all. The project will never be built. Thus, the major purposes of the bill were to provide some certainty for both existing and new water supplies, and to bring this policy issue before the Legislature.

My third point is that it is not fair to say that the only way to protect fisheries and the environment is through the public trust doctrine. There are dozens of state and federal laws which protect the environment; but, those laws, when satisfied -- when complied with -- then set the stage for financing and planning the public works projects. The public trust doctrine upsets the planning and financing. We believe the Legislature should take the "rough edges" off this doctrine and

establish certain sound ground rules, so that planning and financing decisions are not made in a "vacuum".

The next question is, who will pay for successful public trust claims which take away a community's water supply. Water rights are, primarily, held by public agencies. If more water must be released into a river for fisheries, should local residents pay double for the old facilities? Public trust claims can be brought at any time, against any community's water supply.

This "hit and miss" doctrine can unfairly single out one watershed, one community, one project. Our Legislature needs to address the question of who will pay for these potentially staggering economic losses.

The final reason this bill was introduced was to reinforce the Legislature's decision to have a State Water Resources Control Board to decide water rights questions. We have a method for consideration of public trust claims that was put in place by this Legislature, decades ago. That procedure clearly requires the State Water Resources Control Board to consider fish and wildlife needs when issuing or modifying a water right permit.

AB 4439 reinforced this procedure, and gave the State Board broader authority to decide public trust issues. We believe the State Board is the appropriate forum to decide public trust water right matters. We object strenuously to the present system that allows "forum shopping" among the various courts of this state.

I would now like to ask John Fraser to make a few comments on our jointly-sponsored bill.

John?

MR. JOHN FRASER: Mr. Chairman, I'm John Fraser, representing the Association of California Water Agencies.

I would like to endorse and underscore Mr. Marguleas' statement, and would like to suggest to you that, as were some of the statements that you've heard already this morning, those that you're likely to hear this afternoon will be in the nature of a dentist approaching you with his drill going full blast, and saying, "This is not going to hurt you a bit. The public trust doctrine has been in existence for some time, and we can assure you that there is nothing to be alarmed about."

The difficulty, as we see it, is that our members are going to be the ones, as the responsible parties for delivering water in this state, who will have to answer to the farmers, and to the people in the cities, should we be unable to deliver that water, because of any public trust claim.

When we asked Mr. Waters to introduce AB 4439, with the intent of getting this issue before the Legislature and having it discussed, we had no idea that this hearing would be so timely, in terms of the Bay-Delta hearings, and what might be coming out of those hearings. I suspect the value of this hearing has been more than emphasized this morning, by the statement of the last witness, from the State Water Resources Control Board, and their willingness to sit down and talk over some of the more "sticky" issues.

The other analogy, that I'd like to close with, is that I think many of our people have the feeling that the present

situation, with respect to public trust, is sort of like a football game, where you get on the football field, and you have an official there with a rule book, but you don't know any of the rules; and, it's only when the official comes down on you, by way of a court decision, that you finally understand what the rules of the ball game are. We have to know what the rules of the "ball game" are before we begin "playing on the field". We think the Legislature can do a great deal to delineate those rules for us, to enable us to operate.

Mr. Waters' bill was not intended to be an "end-all" for all public trust issues, obviously; but, it was considered to be a vehicle, through which the Legislature could look at some of the more "sticky" issues and, perhaps, address some of those issues, and others, as well, that will be brought up in the hearings this week.

CHAIRMAN COSTA: Thank you, Mr. Fraser and Mr. Marguleas, for your comments.

It seems like most of these issues seem to be pretty "sticky", at this point. I would guess, from your comments, that you disagree with Mr. Thomas about the need for uncertainty in this area.

Let's talk about some of the specifics of the measure that you co-sponsored, AB 4439. It was stated earlier that the power that you would place with the Attorney General, if that measure were to become law, was inappropriate and that it shouldn't be where the focus ought to be, in determining these public trust areas. Do you want to comment?

MR. FRASER: It could be that the procedure that was suggested in the bill, with respect to the Attorney General being the responsible party, may not be the appropriate way of approaching this. We don't know; we think this should be explored. It seemed to us that, with the precedent being established in Proposition 65, for the Attorney General bringing such actions, or being the appropriate party, and then deferring to others, was a method that we might try.

I think it's somewhat ludicrous that once the State Board has completed the Delta hearings, and has allocated the water resources of our state, in whatever way they deem appropriate, that any individual would have the right to bring an action in any Superior Court in the state to challenge that position, and presumably have a judge rule that that decision was invalid. That is not the kind of certainty that we would like to see in the water rights process.

We think the Board is the appropriate place, as Mr. Marguleas pointed out in his statement. That is the place where the water rights administrative process begins, and we think that that is the appropriate forum where those issues should be discussed and decided, not in any court in the state, where any individual might choose to bring an action.

CHAIRMAN COSTA: Let me ask another question, as it relates to the bill: The public trust doctrine, as it has been interpreted in California, allows the opportunity for any individual to go to court -- in essence, to have standing, to deal with environmental concerns. One of the changes that would have

been made, were AB 4439 to become law, would be to prevent individuals from litigating a public trust challenge. Shouldn't the right to have a day in court be made available to each individual?

MR. FRASER: Well, the individual, if enforcing the right, I think, is not the problem; the forum in which the individual enforces the right is the problem. I think the appropriate forum is the State Water Resources Control Board; but, at the same time, there must be some finality to the process, Mr. Costa, in water rights hearings. Once the Board has handed down a decision in a water rights matter, we think that the agency applying for that decision should be able to rely on that decision and build its project in accordance with that decision.

We've lived with this law, now, since 1959; the Legislature put it on the books then. We have, I think, pretty much considered that those statutory requirements in the Water Code are, as the representative of the Board said, tantamount to the public trust procedures. Those projects that were built before those statutory provisions were enacted are more difficult projects to deal with, admittedly; some would be seriously hurt now, if a court or the State Water Resources Control Board would step in and require huge releases of water, in order to satisfy demands downstream.

CHAIRMAN COSTA: The reason I had raised that is because you used the Prop. 65 example for the way you structured the Attorney General as being an arbitrator of sorts. Under Prop. 65, that allows the provisions for that individual participation, and

I just...

MR. FRASER: ...That's exactly right. Ours is a little bit different than Prop. 65...(LAUGHTER)...

CHAIRMAN COSTA: ...Well, I didn't support Prop. 65. -- not because I don't want clean water; but, because I didn't think it was the proper approach. That's another matter; we're dealing with public trust.

Any other comments, gentlemen?

MR. MARGULEAS: No, we just certainly want to thank you very much for allowing us to speak here today.

CHAIRMAN COSTA: Well, we appreciate that. We appreciate the fact, as a co-sponsor of the measure that Mr. Waters introduced, that you would be here to make your case. This is an issue that, obviously, is not going to go away. It's "part and parcel" to the State Board's involvement in setting new water quality standards that will have a tremendous impact on the state in the next two years. We are looking for input.

Is it your feeling, representing the Chamber, that the Legislature should not sit placidly by, the next two years, as the Board attempts to grapple with this awesome decision-making process? You think we should give them greater direction, I guess.

MR. MARGULEAS: We clearly believe that the Legislature should take the initiative on this issue. We think the foundation for state water needs improvement, and needs additional financial structures added to it. The financial community certainly would not look favorably at all, with the lack of stability, on the

final decision. We think it will rest with the Legislature.

MR. FRASER: Mr. Chairman, I'd like to subscribe to that. I would like to point out that, as important as the Delta hearings are, this application is being felt -- and being used, as a matter of fact -- in many other cases in the state today. So, I think it's important that the Legislature get on with the process. It's going to be a long process, in order to work out a bill that's going to be helpful and meaningful...

CHAIRMAN COSTA: ...Then you're indicating that even if the Board were not in the process of the Bay-Delta hearings, and that were not an issue, that it would still be important that the Legislature, as you say, "round off some of the rough edges"?

MR. FRASER: That's right. And I'm saying that, in spite of the fact that they are involved also, I think it's important for the Legislature to take a very close look at the impact of this doctrine.

CHAIRMAN COSTA: All right.

Thank you very much, gentlemen.

MR. FRASER: Thank you.

CHAIRMAN COSTA: Members who have been patiently waiting, we will now break for lunch.

Those of you who participated this morning, and are going to participate this afternoon, we will attempt to get started at 1:30.

We will have the Mono Lake case -- the National Audubon Society v. Superior Court. We will have our next panel that will "kick off" the afternoon session.

So, with that, I want to thank you very much. We'll see you at 1:30.

-LUNCH BREAK-

CHAIRMAN COSTA: The Committee will come back into order for the afternoon session.

The afternoon is as full in its attempt to take on the agenda at hand as it was in the morning; so, I would try to expedite the comments that are made by the witnesses -- to the point and as concise as possible.

We'll begin with the Mono Lake case -- the National Audubon Society v. Superior Court. We'll begin as we did this morning, with the legal perspective first.

Patrick Flinn, Attorney at Law, with Morrison and Foerster...Mr. Adolph Moskovitz, Attorney at Law, with Kronick, Moskovitz, Tiedemann and Gerard...We will ask those gentlemen to stay up here, as we then follow with the public policy perspective, to get a rounded discussion on this.

Mr. Flinn, it's nice to have you here this afternoon.

MR. PATRICK FLINN: Thank you, Mr. Chairman. It's a pleasure to be here, on behalf of Morrison and Foerster, who has represented the National Audubon Society and the Mono Lake Committee in approximately the 10 years the public trust lawsuit has been fought.

I personally worked on the lawsuit for the last six of the 10 years that it has been pending. I'd like to think of this, a little bit, as a "report from the front lines", as it were, of the public trust "war" -- although we hope that it doesn't necessarily take on quite that "adversarial" a context.

I did attend this morning's hearings; I hope that my comments can add to, rather than repeat, what has already gone on. It seems to me that this morning can be distilled into two separate issues, which I think deserve different analysis: On the one hand, you have the substance of the public trust doctrine; that is, what does the public trust doctrine do, with regard to water allocation? And then you have the procedure; that is, how does California decide to implement the public trust doctrine?

The substance of it, I believe, can be distilled to a relatively simple proposition that was enunciated by the California Supreme Court, which is simply that you preserve public trust feature values when it's feasible to do so. When it is not feasible to do so -- when it is not reasonable to do so -- the Audubon decision is clear, that the public trust values are not to be protected.

The procedure seems to me to be the focus of the concern of the pending legislation in much of the discussion. That is the question: Does it promote uncertainty, with regard to water rights...?

CHAIRMAN COSTA: ...And is that uncertainty good? (LAUGHTER)...

MR. FLINN: ...And is that uncertainty good? I wouldn't

go so far as to say that the uncertainty is good, but I would make this following observation: If you accept the premise that the public trust doctrine is something that California law ought to have, that it ought to be of value, and that our state ought to incorporate it in its laws, then, essential and indivisible from the public trust doctrine, is some concept of continuing supervision.

A trustee is someone who continually overlooks and supervises the use of the trust values -- the trust object -- in this case, the water that is the property of all of the public for the State of California. You can't divide that and eliminate all uncertainty. If you're going to give the State of California the right to take a second look at a water allocation decision, you're going to have some element of uncertainty.

I would submit that there is a range -- a spectrum: On the one hand, you have finality; and on the other hand, you have complete uncertainty, with no finality whatsoever. I think it's debatable as to how close we are to this extreme; but, I would suggest that the pending legislation is far too close to this extreme.

I'll come back to "finality", in a second; but, one thing bears in mind -- just what the concept of "finality" means. That means that you are willing, for the goal of finality, to keep a bad decision -- a decision that everyone would agree is bad, if we could do it over again. For the sake of finality, you're going to live with it; you're going to live with it, either for some period of time, or in perpetuity. I would submit that the Mono

Lake case is a quintessential example of the down side of sacrificing supervision at the "alter of finality".

There has been some suggestion this morning that the public trust doctrine is somehow a 1970's or 1980's revolution in the law. Now, in preparation for this hearing, I did want to take a look into the history of California law and the public trust doctrine, to see how the courts first came up with this notion in the State of California. I went back into the stacks of the Morrison and Foerster libraries, and came up with this volume from 1884, which, I believe, is the first reported decision. In California Supreme Court, it's the People v. Gold Run Ditch and Mining Company. This was a case that, I believe, represents one of the first efforts of California to evolve from one kind of economic reality to another.

Prior to the 1880's, California had a lot invested in its gold mining; it was a principle source of revenue for the State. A lot of people came to the state. As the gold mining began to play out, and California began to develop its other commercial activities -- its great agriculture, its transportation -- mining became harder and harder to do. They began to mine by use of high-pressure hoses.

This case involves mining companies that would use a long-established, perfectly lawful method of mining coal, by simply hosing down, with high-pressure hoses, large quantities of a hillside, and then sifting through the "tailings" to get gold out. The "tailings" would then drift into the river and would block the navigation of the rivers, preventing commerce from using

them. The State of California tried to sue to prevent this practice.

Not surprisingly, the argument against the imposition of a public trust, in this case, was, "We've been doing this for a long time. We spent a lot of money investing in this procedure. It's going to cost us some money, if you make us do it differently." The principles of finality, frankly, were underlying the mining company's defense in that case in 1884.

Happily, the California Supreme Court, 100 years ago or more, recognized that if California were to continue to grow, and continue to be forward-looking, it was going to be necessary for the state to revisit and rethink the way it used its natural resources. This is but one example, and I would submit that the National Audubon Society case is descended from this long line of cases; and it is, by no means, a revolutionary departure from case law.

CHAIRMAN COSTA: Did the Court, at that time, actually cite the public trust doctrine?

MR. FLINN: Yes, it did. At the time, it also considered it in the context of a public nuisance; the case also stands for some public nuisance propositions. It very definitely cites the concept of the public trust, and embodies the navigability of the river as something that could not be abridged by a private party.

Given, then, that if California is to have the authority to revisit and rethink its decisions, and if that is really indivisible from the public trust doctrine, then you're going to

have to have some kind of ability of your decision-makers...What forum you have the decision made is a separate question...But, I don't think that you can simply erase uncertainty entirely, and keep the public trust doctrine.

The effect of sacrificing the public trust at the "alter of finality", I think, can be illustrated in the history of the Mono Lake litigation. Ten years ago, the lawsuit was filed -- almost 10 years ago; in 1979, it was filed. There is still yet to be the hearing on the merits of the case. Not one drop of water has been determined to be required to preserve the Mono Lake public trust values.

The notion that "wild-eyed environmentalists" are going to be bringing these lawsuits, and turning off the spigots of Californian water users, overnight, is simply an unrealistic prospect.

ASSEMBLYMAN WATERS: Mr. Chairman...

CHAIRMAN COSTA: ...Mr. Waters, a question or comment?

ASSEMBLYMAN WATERS: I was under the understanding that there was a reduction of the water that actually flows into Mono Lake, through some sort of an agreement, and subject to pending lawsuits that were obviously in the violation of the public trust doctrine. There was some consideration by the City of Los Angeles to cut back some of those inputs from some of the numerous little creeks that flow into Mono Lake. Isn't that so?

MR. FLINN: There are two lawsuits, separate from the Mono Lake litigation -- which is solely a public trust lawsuit -- which invoke a statute in the Fish and Game Code, Section 5937,

which requires that the owner of a dam preserve fish life below the dam. Those two statutes were the principle bases for these two lawsuits, for two of the creeks feeding Mono Lake. They're pending preliminary injunctions -- pending trial.

Both cases rely, principally, on Section 5937, although there are public trust allegations in the cases. Certainly, with regard to Mono Lake, there has been no hearing whatsoever on the merits of the public trust case that the Supreme Court decided in 1983.

When the Mono Lake litigation was brought, we were faced with the following response, basically, from the Water Board: According to a record at the time, 45 years ago, when the water rights were first granted, the public protests from the local residents of the Mono Basin area, which were saying, "This was the area of origin for the water. You're going to be taking this water away. It's going to be destroying our farming. We rely on the fishing and the recreational area here for our livelihoods, and you're taking that away." The predecessor to the Water Board said, "Well, we understand that you have these problems; but, our mandate is to give the water to the first person who is willing to spend the money to divert it. The first person here who sought the appropriation is the City of Los Angeles. Our hands are tied."

The argument, "Our hands are tied", was raised up through 1983. We think it might well have been a bad decision. If we had to do it all over again, we would; but, the fact of the matter is, we can't revisit it. All the California Supreme Court

said in the Audubon case was that some responsible body ought to rethink the Mono Basin water allocation decision. And there was concurrent jurisdiction between the Water Board and the courts to do that, in this case.

When you consider the public trust as a legal issue...One of the features of this bill, in fact, suggests that the courts ought not to be the place to litigate these things, and that you ought to limit standing to the people who can bring these kinds of lawsuits.

I submit that you're solving a problem that has yet to be proven to exist. As I say, the first lawsuit to bring a public trust claim in the State of California has not yet gone to trial, and it has been 10 years. There has been close to between $500,000 and $1 million in legal fees on one side -- our side -- to bring the case. I don't submit that there is a whole, great quantity of litigants out there, who are just "chomping at the bit" to fund these kinds of lawsuits. Only the important lawsuits will be pursued; even the very important one may take a long time to litigate. I would submit that if there is a problem that has been revealed in the adjudication of public trust lawsuits, it's that there ought to be amendments to the procedures to expedite their resolution, and not have them drag on as long as they have -- in some cases, seemingly, without end.

The lawsuits are difficult, they're expensive, and they require a great deal of technical expertise. Frankly, when you have as diligent, thoughtful, and creative lawyers, as those who represent the City of Los Angeles -- my firm has had the pleasure,

I think, of standing next to Mr. Moskovitz in different forums than this one -- those are going to be hard-fought, difficult battles. They are not going to be the subject of frivolous lawsuits.

I can close my remarks, at this point, by suggesting that, while you may wish to consider legislation that deals with the procedure by which public trust cases are adjudicated, and that you wish to promote the value of certainty, the value of finality -- which I would submit are goals -- that you don't sacrifice the substance of the public trust doctrine, which is, and remains to be, a valuable feature.

On the issue of having the Court as a forum for it, we would submit that, for the most part, environmental concerns are "orphans"; there is no ready-made constituency out there, there is no money, and there is no entity that has got a natural desire to want to spend its resources to protect these values.

Historically, in our country, the courts are the places where the "orphan" is heard. I do think that it is pretty much beyond controversy that if the Mono Lake case had not been brought in court, the City of Los Angeles would not now be making the statements that it is, and that maybe it is time to rethink, and take another look at, the Mono Lake decision.

Thank you.

CHAIRMAN COSTA: Thank you very much.

How would you argue that we provide for greater certainty and procedure, if we were to address that in this upcoming session, and not take the approach that Mr. Waters has in

his legislation?

MR. FLINN: I would suggest that the first thing you do is realize that there are two different kinds of water rights problems out there: You have the "old" kind, in which the Water Board, not having the power to undertake the public trust balancing in the first instance, has never done it. I think it is necessary to say that you want to preserve the opportunity to rethink that decision, because it was never made. On the other hand, you now have, since the late-1970's and early-1980's -- the onset of public trust litigation in the courts -- the Water Board beginning to make that balance. It's beginning to make that balance, both with regard to new appropriations requests that are coming into it and the applications, as it's forced to deal with the fact that water is a limited resource.

I think the two of those present separate problems. You may consider that a decision of the Water Board, in which it is clear that there has been a full, complete and thorough adjudication of the public trust balancing. The judicial deference to that decision is, frankly, likely to result from the courts; but, it's certainly an appropriate consideration. Indeed, those water rights holders, who have yet to spend the money to develop the diversion facilities, may want to consider seeking out an adjudication by the Water Board of what public trust balancing may be required, so that they can know, before they spend any money, just what the public trust requirements could be.

To the extent that you do provide for judicial deference, however, in water rights decisions, again, you would

want to be very careful that you don't "throw out the baby with the bath water" and preserve what is essential to the public trust doctrine, and that is some concept of continuing supervision.

CHAIRMAN COSTA: All right.

Any other questions?

Why don't you have a seat, Mr. Flinn. You will be followed by Mr. Adolph Moskovitz.

MR. ADOLPH MOSKOVITZ: Mr. Chairman, Members of the Committee, staff and people who are interested in the audience, my name is Adolph Moskovitz. I'm a lawyer with the Sacramento law firm of Kronick, Moskovitz, Tiedemann and Girard.

I have been practicing as a specialist in water resources law for nearly 40 years. I was a government lawyer with the U.S. Bureau of Reclamation, and then with the State Attorney General's Office, for about 10 years, and since 1959, in private practice. I represent -- and have represented -- both public and private clients, throughout California, and in Western Nevada, on water resources law and environmental issues.

Since 1981, I've been Special Counsel to the City of Los Angeles Department of Water and Power, in the various disputes about Mono Lake, and the diversions of water from the Mono Basin. These include the Audubon case, involving the Mono Lake directly, and the other cases, involving the tributary streams, which were referred to briefly, by Mr. Flinn. These cases have involved the public trust doctrine, as well as other cases, in which I've had some experience, in recent times.

I might mention, in commenting on what Mr. Flinn just

said, that in the two stream cases that he referred to, in which preliminary injunctions had been issued, and the City had been required to release certain flows of water down to Mono Lake for fish protection, the judges in both of those cases, in deciding that a preliminary injunction was appropriate, relied upon the public trust doctrine, although Fish and Game Code Section 5937 was also raised, as a basis for seeking the injunction. That was not the authority that the judges relied upon in saying, "It looks as though a preliminary injunction should be applied in this instance."

I want to emphasize that my remarks are not officially on behalf of the Department of Water and Power; they'll reflect my own views, based on my involvement in the cases throughout the state.

There are three aspects that I would like to focus on, regarding the public trust doctrine: First of all, its statewide significance -- and that may be self-evident, with all the interest that has been expressed, and the various people who have spoken up about it...But, I do want to point that out, to emphasize that, throughout the state, urban water users and agricultural water users who use most of the developed water, could be affected by the public trust doctrine.

As the Supreme Court laid down the doctrine in the Audubon case, it addresses diversions, which affect navigable waters and the large projects in the state that serve the major urban areas: San Diego, the Los Angeles area, Southern California, generally, the San Francisco Bay Area, and the

Sacramento area -- all derive significant portions of their water supplies from navigable waters, or waters that affect navigable waters...And irrigated agriculture, too, largely through the big Central Valley Project of the federal government and the State Water Project, tap navigable waters of the Sacramento-San Joaquin Delta and the tributary streams that are dammed for those water supplies.

All of these water users face uncertainty, because of the decision. Whether uncertainty is desirable or undesirable, the fact is that a great deal of uncertainty has been injected into the water "picture" by the Audubon decision. It's not the only decision, and the only recent activity, that has resulted in such uncertainty, but it is a major source of uncertainty. The basic uncertainty is that diverted water supplies, long thought to be assured, under vested rights, are now subject to reallocation for instream public trust uses. So, what was once thought to be secure, no longer is.

The uncertainty, though, extends beyond that. If you accept the basic proposition that water can be reallocated, in order to provide for public trust uses not theretofore provided for, and water taken away from those who have relied upon it for decades, there still remains the various kinds of uncertainty that are created by how the doctrine will be applied. Some of them have already been identified by Professor Gould, but I want to just quickly go over a short list of the most critical ones that immediately strike one when one starts to think about what actually happens in a public trust balancing.

The kinds of uses that are protected by the public trust are always subject to expansion. Originally, there were very few, as Professor Gould pointed out; now, they're quite broad and, perhaps, the broad definition, at this time, is so sweeping, that you cannot expect it to be expanded still further. Nevertheless, the possibility does exist, because of what the Supreme Court itself has said about public trust uses. In Marks v. Whitney, the Court expanded public trust uses to include recreation, the environment and the resources for fish and wildlife. The Court said that public trust uses are sufficiently flexible to encompass changing public needs, and that the state is not burdened with an outmoded classification favoring one mode of utilization over another.

Another uncertainty is the kind of water rights which are subject to those limitations. The Audubon case concerned the statutory water rights that the City of Los Angeles had been awarded and had exercised. The decision doesn't clarify whether it would be extended to other kinds of rights -- riparian rights, prescriptive rights and reserve rights. Professor Gould said, in his view, the rationale would extend beyond appropriative rights to those rights. I tend to agree that that would be the consequence. Nevertheless, that is still an issue unresolved.

Another uncertainty is whether navigable waters have to be impacted. The Audubon case went off sharply -- clearly -- on the fact that navigable waters would be affected; but, the Attorney General has argued that the doctrine applies to nonnavigable streams, in which fish are affected. There had been

arguments, advanced by others, that the doctrine applies to all waters of the state, without any qualification. Then, the question is, is ground water subject to the public trust -- for example, when the ground water is a source of vegetation, and the pumping of ground water would lower the water table and, perhaps, reduce the amount of vegetation for the natural environment? As I pointed out, except for the River (INAUDIBLE) in Greek mythology, ground water is not generally regarded as navigable.

Another uncertainty: Does it apply to non-natural flows -- or bodies -- of water? That has also been referred to by other speakers. It's a very, very pertinent issue. There are lawsuits on file now, in which both the release of stored water is sought, under the public trust doctrine, and the retention of stored water in a reservoir -- not to have it released -- is sought, under the public trust doctrine. If those situations are covered by that doctrine, it certainly expands the area of uncertainty.

Last, but certainly not at all least -- perhaps, most significantly -- there is uncertainty, because of the absence of any articulated standard, to be used in determining whether a particular diversion should be curtailed. The Audubon decision laid down a number of factors to be considered in any public trust balancing; but, how they will be weighted against each other is left totally unresolved, without any standards to guide the (INAUDIBLE) of the facts. The courts are left in the role of making policy decisions of public interest as to competing water uses; these will be determined on the basis of the particular social, political and environmental values and perceptions of the

judge who happens to be assigned to the case in the Superior Court, wherever that case may be brought.

It is uncertain to what extent there can be some oversight, at a higher level -- as far as the Supreme Court, which, of course, is the supreme judicial body in the state -- as to findings regarding these matters. Generally, findings of superior courts are upheld, if they're supported by substantial evidence; it's only pronouncements of law which are free to be overturned by the appellate courts. This is an area of uncertainty, as well.

Because of all these uncertainties, and the absence of any standards to determine whether there has been an appropriate resolution of a public trust dispute, settlement, it seems to me, is affected -- the possibility of settling cases, short of a litigated judgment -- because the parties are left with even less guidance and ability to assess what a likely determination would be if it did go to litigation and judgment.

Beyond that, as we've discussed, if there is a resolution, either by settlement or by court judgment, then somebody else, who asserts an interest, can bring the matter, once again, before the Court or the State Water Resources Control Board. There is no standard as to what is necessary to justify a further reexamination. One of the cardinal principles in the Audubon decision is that there is the continuing responsibility of the state, and the continuing authority of the bodies that look at these disputes, to take another look and make another reallocation further on.

In my view, the most disturbing prospect, raised by the public trust doctrine, is that a public trust balancing will result in depriving a "diverter" of valuable, long-used and relied-upon water, leaving it with no available substitute supply. This is something that, of course, the City of Los Angeles is facing, in this particular Mono Lake dispute; but, all those who would be challenged would face that prospect.

In allowing that to happen -- not imposing it yet, because there is still to be the trial and the determination of the merits -- the Audubon decision was a departure from long-established California water rights law, and long-established constitutional doctrine. The fact is that water rights, until recent times, had been consistently described in California law as being property rights, which are subject to the same protections, and the same rights, on the part of the owner, as any other private property. In the paper, I quoted from a 1912 case, which so established.

It's clear that, under the Constitution -- the Fifth and 14th Amendments of the U.S. Constitution -- that private property can be taken for public uses, only on the payment of just compensation. The Audubon decision approached this problem in an imaginative way, by defining water rights in such a way as to remove this characteristic of being a private property right, by saying that, from the very beginning, these rights were subject to the public trust, although nobody knew it, until announced by the Court in 1983. The Court says that there are no vested rights that bar the reallocation of water, under the public trust

doctrine...

CHAIRMAN COSTA: ...Mr. Moskovitz, Mr. Flinn argued that, in a case that he cited, in 1884 -- I believe that was the date he gave -- that the public trust doctrine had been established for the first time then, in California, and subsequently, thereafter, in a number of court cases. Are you arguing that the first time that the concept of the public trust doctrine was argued was in the Audubon case?

MR. MOSKOVITZ: The public trust doctrine, as it applies to land, has long been in California law. That's the doctrine that was described by Professor Gould, which says that the state's authority and ownership of land, subject to tidal influence on navigable waters is superior; it's a trust right, which cannot be damaged by private activity. That was setting up the public trust as a barrier to any intrusion by private action. The doctrine announced by the Audubon Court is not that same doctrine; it is an application and a change of that doctrine...

CHAIRMAN COSTA: ...It's an expansion of the doctrine...

MR. MOSKOVITZ: ...It's an expansion, in one sense, and it's a contraction, in another sense. It's an expansion to water rights, which never previously were subject to it. I don't think that the case cited by Mr. Flinn is contrary to what I'm saying. It was a contraction of the doctrine, in that it said that there can be intrusions on the public trust in waters, if necessary, to allow the economic and social development of the state. So, it was not an absolute barrier to private intrusions. It was a transformation of the doctrine and an application in an area where

never before had it been applied.

The Supreme Court was very frank to say that its decision was to clear away the barriers that otherwise existed to a reallocation of water that the City of Los Angeles had obtained. We have not yet had the opportunity to test whether, constitutionally, that would stand up before the U.S. Supreme Court. There was a request to the U.S. Supreme Court to review the Audubon decision; it was denied. The argument had been made by the Attorney General of the United States, in opposition to such review, that it was not yet "ripe", because the City had not yet actually lost anything. All that had happened was the announcement of a new rule of law, and whether the City would lose something depended upon what happened in the trial of the merits.

Now, aside from legal considerations, it's my view that the means to obtain replacement water supplies to those whose rights are impaired by the application of the public trust doctrine is important for practical and moral reasons. The fact is that you may have communities that have invested substantial sums of money, have foregone other means of obtaining water supplies, and have relied upon the water, and the effect has been something that was either not known, or appreciated, at the time that they were allowed to proceed -- an environmental value that is deemed to be overriding results. If that happens, and the consequence is that the "diverter" is told to reduce, or eliminate, the diversions, the people who are directly affected ought to be given some help by the larger community, on whose behalf that public trust resource is being protected.

The people of this state are the beneficiaries of the public trust resource. It's the statewide interest and, indeed, the national interest, that the Supreme Court cited in the Audubon case...

CHAIRMAN COSTA: ...Are you implying, then, that if the Superior Court were to rule in favor of the Audubon Society, then it should be the state that should compensate the City of Los Angeles?

MR. MOSKOVITZ: I'm saying that the City of Los Angeles should be provided the means...

CHAIRMAN COSTA: ...I mean...To give an example...

MR. MOSKOVITZ: ...Yes...

CHAIRMAN COSTA: ...I'll put it very directly: The people of the City...

MR. MOSKOVITZ: ...I thought I was putting it pretty directly...

CHAIRMAN COSTA: ...Yes, but, the people of the City ought not to be expected, on their own, to bear this burden that has been imposed because of the needs -- or the benefits -- of people throughout the state. So, the state and, perhaps, the federal government, as well -- and others -- who are so interested in restoring what they think is so important for the rest of the people, should participate in seeing to it that the people of the City of Los Angeles -- and we're not talking about the City as an abstract entity -- will continue to have those water supplies that they need, and continue to have the water quality that they now have, and not be shouldered with an

unbearable financial burden in doing so.

Saying that doesn't mean it's going to be easy to accomplish. We know what's been happening to the water supplies of this state; we know that the availability of water has been constantly reduced, because of various reasons -- environmental, political and financial. But, the latest draft report from the State Water Resources Control Board staff shows that the source of water that L.A. would have to look to -- that is, the State Water Project -- might be reduced. If its Mono Basin supply was reduced itself, the City's water supply would be gravely threatened. It seems to me that a responsible approach to this public trust balancing is that those who are deprived should not be left all by themselves to try to recoup what they have lost.

CHAIRMAN COSTA: So, how do we address that?

MR. MOSKOVITZ: Well, I think that the Legislature can, and should, attempt to put together, at least, some standards, to try to reduce some of the uncertainties and consider what should be done, in terms of helping those who may be adversely affected. The Legislature is the place to do it; the courts are not the place to do it. The courts decide the cases that come before them on the narrow issues of the case. So, I think the Legislature ought to look at the points that I've made.

I don't think, at this date, one can expect that the Legislature is going to destroy the public trust doctrine, assuming the courts would allow it. I've always been puzzled by why it is that the Legislature and the people of this state cannot decide what they want to about the public trust doctrine. I don't

know from what source the law comes, that makes it incapable of adjustment by the Legislature, and the people whom the Legislature represents.

In any event, I think the Legislature is the place to do it. I think the courts would probably welcome some overall policy guidance from the Legislature.

CHAIRMAN COSTA: Thank you very much.

Yes, Mr. Isenberg.

ASSEMBLYMAN ISENBERG: Mr. Moskovitz, is the City of Los Angeles willing to pay anything for replacement water?

MR. MOSKOVITZ: Well, I really can't speak for the City, in that regard. As I said, these remarks are mine...

ASSEMBLYMAN ISENBERG: ...Well, putting you in your role as a City spokesman, does the City of Los Angeles agree that any cost of replacement water should be borne by anybody other than themselves? Is that the official position?

MR. MOSKOVITZ: The position that has been announced a number of times, as a policy, by the Board of Water and Power commissioners and the administration of the Department of Water and Power is, yes, there should be aid from other levels of government,...

ASSEMBLYMAN ISENBERG: ...No...

MR. MOSKOVITZ: ...other entities...

ASSEMBLYMAN ISENBERG: ...What I'm asking is, whether they have said, categorically, that under no circumstances are they willing to pay even one penny towards replacement...

MR. MOSKOVITZ: ...I have not heard that statement...

ASSEMBLYMAN ISENBERG: ...All right.

I know Mayor Bradley has recently made a statement, within the last three months, on the Mono Lake controversy. Speaking on behalf of the Department of Water and Power, how would you characterize the Mayor's statement?

MR. MOSKOVITZ: I'm not familiar with the Mayor's statement that came out in the last three months; but, there has been a policy statement issued -- I think in the last couple of weeks -- by the Board of Water and Power commissioner...

CHAIRMAN COSTA: ...The next witness, Mr. Isenberg, might be better able to address that question.

ASSEMBLYMAN ISENBERG: Mr. Georgeson? All right. Yes, thank you.

MR. MOSKOVITZ: I think he'll be better able to reflect the official views of the Department.

CHAIRMAN COSTA: A couple questions...I'm sorry -- are you done, Mr. Isenberg?

On the question of uncertainty that we spoke of earlier -- that I spoke of with Mr. Flinn and that you addressed in your comments -- under the "reasonableness" test, found in Article 10, Section 2, of the State Constitution, which would include coverage for all waters of the state, that does exist, does it not?

MR. MOSKOVITZ: Oh, yes.

CHAIRMAN COSTA: Why is that so different, when we point the finger at the public trust doctrine?

MR. MOSKOVITZ: I'm not sure it is so different. The uncertainty that we've been experiencing in recent years has not

been created solely by the public trust doctrine. I think I indicated that a little earlier.

The new view of what Article 10, Section 2 -- the "Reasonable Use Doctrine" in our Constitution -- what it means, and how it can be applied, has also been made more uncertain. The Racanelli decision says that, on the basis of "reasonableness of use", there can be reallocation of water rights. It's the same sort of thing that the public trust doctrine would allow.

I think that here, too, in the case of the Delta, there could very well be helpful guidelines by the Legislature. My own personal view, based upon the kinds of experiences I've had, and my own commitment to the idea of as much certainty as possible, is that it is not a good idea to reallocate water that people have been relying upon and have made investments upon. There ought to be some means by which, if you need the water for some other purpose, those people are provided an alternative. But, to allow reallocation of water, because of changing perceptions, without looking at how you help those who are adversely affected, I think, is not a desirable public policy.

CHAIRMAN COSTA: As an attorney, Mr. Moskovitz, I find it interesting that you argue for certainty; I'm not so sure how that speaks toward continuing the case load...(LAUGHTER)...

MR. MOSKOVITZ: ...I don't worry about that...(LAUGHTER)...

I might say this, Mr. Costa: One of the more recent California Supreme Court decisions, which drastically changes California water rights law, did so on the basis that it was

necessary, in order to produce certainty. This is the case that drastically restricted (INAUDIBLE) water rights law, and said that was necessary, because otherwise, there would be too much certainty. So, the thread of the desirability of certainty is in our law, too...

CHAIRMAN COSTA: ...Final question: Since you've been arguing throughout your statement that the Legislature ought to provide greater direction, if you were to make some suggestions to us next session -- I'd like you to be specific, here -- how would you argue that we should specifically make changes that would provide the sort of certainty that you've been arguing for?

MR. MOSKOVITZ: Well, I think Mr. Waters' bill contains efforts in the right direction. I'm not prepared, right now, to get into a detailed listing of the things that ought to be in a bill that's finally enacted...

CHAIRMAN COSTA: ...But, on the public trust doctrine...I mean, you've dealt with this issue at great length. What would make it easier for you, as counsel, to argue the cases that you're concerned with? What kind of certainty are you looking for that the Legislature could provide the direction that would assist the courts?

MR. MOSKOVITZ: I think that having a better idea of the process would be helpful. Where you go...Who are the people who have the standing to bring the action...?

CHAIRMAN COSTA: ...Do you think we ought to limit standing?

MR. MOSKOVITZ: I think that some serious thought should

be given to limiting it, so that there cannot be multiple, multiple challenges.

CHAIRMAN COSTA: Limit it to who?

MR. MOSKOVITZ: I think, certainly, the Attorney General is one. To what extent it should be limited further, I think, is a matter that requires a good deal of thought. The approach in the bill was that, if the Attorney General didn't want to bring it, that the Attorney General should designate some other party to do so.

One of the problems that I think we face is that there can be two or, perhaps, even more organizations...

CHAIRMAN COSTA: ...But, that hasn't occurred. Mr. Flinn argued that the situation -- at least, if I understood him correctly...Mr. Flinn, I thought you argued that there has not been a situation that has taken place recently in which we have a tremendous amount of parties out there, threatening to bring suit; in fact, there has only been this one particular case, thus far. These cases are expensive, as he argued, time consuming, and take a tremendous amount of resources, of which the average public certainly doesn't have the ability to proceed with.

MR. MOSKOVITZ: Well, as a matter of fact, the two stream cases that have been mentioned -- streams that are tributary to Mono Lake...In both cases, there are two environmental organizations, which have different views, represented by different counsel. So, you do have more than one that are actually, in fact, coming into a public trust area.

CHAIRMAN COSTA: Mr. Isenberg.

ASSEMBLYMAN ISENBERG: Mr. Moskovitz, do you know of any cases currently pending, other than the Mono litigation, where the public trust doctrine has been extensively relied on...? I mean, not argued, because you toss every argument you can up...But, extensively relied on...?

MR. MOSKOVITZ: ...I'm aware of a case involving the Ventura River, in which it has been pleaded; but, that issue has not yet been reached, because it has gone off so far on the environmental law. But, it's there.

There is a case now, involving the East Walker River, in which it has been asserted...

ASSEMBLYMAN ISENBERG: ...The recent fish kill...Growing out of the recent fish kill?

MR. MOSKOVITZ: That's the case.

I believe it has been relied upon in a case involving (INAUDIBLE) Reservoir -- Golden Feather community case. That's up in the Oroville area.

Of course, in the Delta cases...

ASSEMBLYMAN ISENBERG: ...Right...

MR. MOSKOVITZ: ...it has been advanced. There may be some others that don't come right to my mind.

It's a doctrine that I think is sure to be increasingly relied upon, because it is available. It affords the opportunity to make changes. The fish and game, recreation and environmental organizations are, of course, interested in finding legal bases for doing what they think is so desperately needed; that is, to change what has occurred in the past. That is certainly one basis

for making that kind of change.

ASSEMBLYMAN ISENBERG: Thank you.

CHAIRMAN COSTA: All right. Mr. Waters, do you have a question or a comment?

ASSEMBLYMAN WATERS: Oh, just a brief comment, along the lines, Mr. Chairman, that you asked Mr. Moskovitz.

I would hope, Mr. Moskovitz, that you might help us help this Committee with some language. I recognize that, probably, we moved a little too fast in trying to implement legislation last session. I think with your help and with the input from others -- Mr. Flinn and others -- we can come up with something that may be reasonable here. I want to thank you, Mr. Moskovitz.

CHAIRMAN COSTA: All right. Thank you very much.

If you gentlemen will be seated where you are, we'll have the other two members of the panel come before us: Mr. Duane Georgeson, the Assistant General Manager for the Los Angeles Department of Water and Power, and Martha Davis, the Executive Director of the Mono Lake Committee.

Mr. Georgeson, we'll begin with you. Mr. Isenberg, as you already heard, has some questions for you. We'll round this off, on the public policy perspective, dealing with the Mono Lake case.

Mr. Georgeson, please proceed.

MR. DUANE L. GEORGESON: Good afternoon, Mr. Chairman, Members of the Committee and staff and audience.

I'm Duane Georgeson. I direct the Los Angeles water system. I appreciate the opportunity of appearing before your

Committee today to address this important issue.

I have a statement; although it's brief, it covers a number of issues which have already been dwelled on this morning. So, what I think might be most useful is to focus on a policy statement which the Board of Water and Power Commissioners in Los Angeles adopted at their meeting two weeks ago, addressing the broad issue of how the Department will attempt to approach the resolution of the very difficult issue at Mono Lake.

I'll briefly go through that statement. First statement -- number one: Water diversions by the Department from the Mono Basin are an important source of high-quality water for the City, as well as an important source of non-fossil-fuel-based electricity. The people have relied on these rights and this water and energy supply for almost 50 years.

Two: The Department will consider any decrease in Mono Basin diversions, in light of two very important realities: First, the City faces considerable uncertainty, with regard not only to the Mono Basin supply, but also to our Owens Valley supply, the Colorado River supply, the State Water Project supply, and also our ground water supply, because of severe threats from ground water contamination; secondly, all water purveyors today are under increasing pressure to serve the highest quality water available. A loss of Mono Basin water would force our Department to serve more water of somewhat lesser water quality.

Three: The Department believes that the Mono Lake ecosystem is currently in a healthy and productive state, particularly in regard to the Lake's ability to provide food and

habitat for large numbers of migratory birds. The Department will continue to participate cooperatively in research to determine the lake levels necessary to maintain the Mono Lake ecosystem in a healthy state.

Four: The Department of Water and Power must view the water needs of the residents of the City as its first priority; however, the Department recognizes that for many citizens of the City, state and nation, the Lake is a unique environmental resource of significant value. The Department acknowledges its responsibility to do what it reasonably can to maintain the Lake in an environmentally healthy condition. The Department also recognizes that to do so will, at some point in time, require a reduction in the City's authorized diversions, which must be replaced from some other source.

Five: The Department believes it is incumbent on all concerned -- the City, the state, the nation, the environmental community, and other relevant entities -- to work together to find means by which both the needs and requirements of the City and the Lake can be accommodated.

Six: Specifically, the Department believes that the responsibility for providing high-quality replacement water and energy must be shared by the state and federal governments and other interested parties...

CHAIRMAN COSTA: ...Does that answer your question, Mr. Isenberg? (LAUGHTER)...

MR. GEORGESON: ...Seven: The Department will continue to vigorously pursue the practical implementation of water

conservation and reclaimed water projects.

Eight: The Department pledges its best efforts to reach such a settlement. Until such a long-term settlement or solution is achieved, however, the Department must continue to represent the needs and rights of the people of Los Angeles.

I'd like to add that the reason why the Los Angeles Department of Water and Power has moved in the direction of adopting this policy relates, in large part, to our experience in dealing with an equally difficult environmental problem in the Basin, just to the south of the Mono Basin -- namely, the Owens Valley. We got involved in environmental litigation in the Owens Valley in 1972, and battled through the courts and the newspapers and the Legislature and Congress, on a whole series of issues, relating to the Owens Valley ground water pumping project. At a point, five years ago, we entered into a cooperative program with Inyo County to try to find a long-term, hopefully stable, resolution of that conflict between the City's need for water and the need for water to protect the environment of Inyo County.

That activity seems to be producing substantial benefits, both directly, in terms of finding ways to pump the huge ground water basin of the Owens Valley, for the benefit of the people in the Owens Valley and the environment in the Valley, and in providing, particularly during drought periods, such as we're currently in, a reliable supply of water for the people of Los Angeles.

We're about a year-and-a-half from completing that program. It appears that that cooperative effort is far more

constructive, in terms of producing benefits for both parties. I think it creates a climate in which we can constructively address a lot of other issues. Because of the City's very large land ownership in the two counties, it's obviously important for us to have a constructive working relationship and to not be locked in tractable legal, political and public relations battles, particularly during this period of time when resources are tight for local government, in both small communities, like Inyo and Mono counties, and in larger communities, like the City of Los Angeles.

I should point out that in resolving -- or, taking steps to resolve -- the environmental issues in Inyo County, there has been sizable financial expenditures by the Department of Water and Power. While we may have been careful, from time to time, to resist offering up some particular formula for resolving that issue, the fact of the matter is, we have made substantial investments, both in terms of our staff time, and financial resources, to develop increased water supplies from that ground water basin -- for example, to restore the flow in the lower Owens River, which had been dry since 1922, and to develop additional fish and wildlife projects, parks, recreational lakes, streams and some increased agricultural flows.

It seems like we are making progress on resolving that issue, without standing on any particular legal issues, by trying to find practical solutions to conflicting water supply and environmental issues.

With that experience in mind, it seemed like trying to

apply that practical experience in Inyo County might provide a good parallel for trying to resolve the Mono Basin problem, as well.

I should point out that the dialogue that has been going on, now, for two or three years, within the Mono Lake Committee has been substantially assisted by the UCLA Public Policy Program. Professor Leroy Gramer and Eleanor Cohen have been most helpful in providing a fair and impartial forum. We've been encouraged that, after some initial reluctance to participate, we now have the State of California, the federal government and Mono County, all participating in those dialogues. It's possible that Martha Davis may want to go into that in a little more detail.

It is our goal to attempt to find a practical solution to this problem, and to not endlessly pursue it through the courts.

I would be happy to answer any questions, either now or later.

CHAIRMAN COSTA: Yes, Mr. Isenberg.

ASSEMBLYMAN ISENBERG: Mr. Georgeson, I don't want to push you too far, but, the policy statement that has been adopted by the Department of Water and Power's governing body, does not preclude -- as I read it -- the water and power users from participating in some cost solution for the Mono Basin. It doesn't exactly say that you're willing to do it; but, it doesn't preclude it. Is that...?

MR. GEORGESON: ...I think it's clearly the intent that we would participate, along with other parties...

ASSEMBLYMAN ISENBERG: ...Okay. Just to let you know, that's my view of how the only way a solution is going to come out of it.

Okay. Thank you.

CHAIRMAN COSTA: The temporary injunction at Rush Creek...I don't know; maybe Martha would be in a better position to respond to this...It allows 14,000 acre-feet, annually...?

MR. GEORGESON: ...That's correct.

CHAIRMAN COSTA: How much water...? At what level, given the evaporation rate, would it require to maintain the Lake at the current level?

MR. GEORGESON: Something on the order of 70,000 acre-feet, more or less. So, it would take, roughly, five times the quantity of water going down Rush Creek. We are releasing about 4,000 acre-feet a year down Lee Vining Creek, as well.

CHAIRMAN COSTA: So, 18,000 acre-feet, which still is a long way from 70,000.

MR. GEORGESON: That's correct.

CHAIRMAN COSTA: So, it would be about 50,000-plus acre-feet necessary...?

All right. Very good.

Martha Davis.

Have a seat, Mr. Georgeson.

MS. MARTHA DAVIS: Good afternoon.

My name is Martha Davis. I'm the Executive Director of the Mono Lake Committee. We are a 15,000-member citizen's group that is dedicated to the protection of Mono Lake.

I have brought a chart to address exactly the question that you were just raising...

CHAIRMAN COSTA: ...Right. You might want to put that so that members of the audience can look at it, too.

MS. DAVIS: I've also got a handout that's a duplicate of the chart for each of you.

I do appreciate the opportunity to be here today...

CHAIRMAN COSTA: ...We appreciate the opportunity to have you here...

MS. DAVIS: ...Thank you.

Obviously, we've come a long way in the 10 years since we organized the Mono Lake Committee. When we were formed, in 1978, few people knew what Mono Lake was, much less where it was; today, it's a destination for at least 250,000 visitors, from across the country and, indeed, around the world. It is ultimately expected that, within 10 years, over one million people will be visiting Mono Lake. For a county that is as dependent on tourism as Mono County is, obviously, the protection -- the full protection -- of Mono Lake is critical to the County's future.

Mono Lake has, obviously, also become an important statewide concern; in fact, I heard from Mr. Potter, fairly recently, from the Department of Water Resources, that for the last four years, they have received more letters of concern and support for the protection of Mono Lake than any other water issue in the State of California. This is consistent.

Perhaps, when we started the issue, there were some questions about the significance of the Mono Lake resources. I

think that question has been answered today; it's recognized as being incredibly important to the state and to the nation, by the Mayor of the City of Los Angeles, by the State Legislature here, by Congress, and by the Department of Water and Power commissioners.

Since no one today has touched on the resource values, I just want to mention that it is one of the oldest continuously existing lakes on the North American Continent, second only to Lake Tahoe. It is the habitat for an unusually large number of birds; at least one million nesting and migratory birds are dependent on Mono Lake each year. They include major populations -- North American populations: Thirty percent of the eared grebes population for the North American Continent, and 10% of the world's population of Wilson's phalaropes, depend upon Mono Lake.

No one can deny the value of Mono Basin water to the City of Los Angeles. On average, the City diverts about 100,000 acre-feet of water; this represent 14% of the City's water supply, approximately. It also generates hydro-electric energy, as it flows down to the City of Los Angeles -- probably less than two percent of the current consumed energy, within the City.

At issue is not the fact that water is even being diverted from the Mono Basin, per se; it's that water, which is essential to the deeds of the public trust resource -- Mono Lake -- and to the area of origin needs of Mono County, is being diverted, particularly when there are feasible alternatives. In other words, what is happening here is that water is being diverted that truly is not surplus to the needs of the area of

origin.

To give you an idea of the dimensions of the problem, I have prepared a chart -- that's over here, to the right. To the left, the chart is a reconstructed history of the water diversions, reflected in the lake levels. The blue and the green represent the historical; the red represents a projection of the future, if the diversions continue, unchanged; the blue represents a compromise solution, that has been advocated by the Mono Lake Committee, since we formed, in 1978.

Prior to the diversions, as you can see, with the dark blue line, Mono Lake was maintained well above 6,400 feet. As you heard this morning, the Mono Lake is a closed hydrological basin. So, the fluctuations you see are in response to cycles of "wet years" and "dry years" -- Mono Lake going up and down. If the diversions had not occurred, according to the study that was done for the California Legislature, called, "The Cori Report", the Lake today would stand at least 50 vertical feet higher than its current elevation of 6,377 feet above sea level.

When the diversions started in 1941 -- or, since then...Between 1941 and today, the volume of Mono Lake has been cut in half. The natural salinity of this lake has doubled. Over 15,000 acres of lake bottom sediments have been exposed to the wind, violating state air quality standards on 11% of all days in the year, and occasionally violating federal emergency air quality standards for particulate matter.

As you can see, there was a period of time when the Lake was lower than it is currently today -- between 1979 and 1982.

During this time, islands were land bridged that are critical to the nesting success of the California gull colony, the second-largest California gull colony in the world. There were dramatic changes in the productivity of the ecosystem, which the birds depend upon for their food supply; and, of course, the dust storms intensified. It was the wet winters, between 1982 and 1986 that caused the Lake to rise about nine feet, bringing it up to its current elevation. It has dropped a little bit since then.

If the diversions continue unchanged -- as you look at the red-lined projection -- according to the studies done by the National Academy of Sciences and The Cori Report for this Legislature, Mono Lake's ecosystem will collapse; we will lose this wetland resource. That will happen within 20 to 25 years.

In The (INAUDIBLE) Report, that was presented earlier this spring to the California Legislature, it was recognized that there would be serious changes to Mono Lake's ecosystem, as soon as next year, and that there is a general ecosystem decline, caused by the increasing salinity in Mono Lake and the potential land bridging of the islands.

If we could go back to 1940, I would imagine we would argue that we would want to restore Mono Lake to its historical lake level; but, we recognize the need for the balancing of beneficial uses, and we seek a compromise -- that's set out in blue -- to maintain a lake level range to sustain a healthy, living ecosystem. What we advocate is a range between 6,378 feet and 6,388 feet.

This recommendation is not "pulled out of a hat"; there

was an inter-agency task force study done in 1979, with representatives of the state, federal and local governments, and the Department of Water and Power, that first recommended this lake level range, in order to protect the ecosystem.

Most importantly, the Forest Service, which is now the leading land-use agency in the Mono Basin, based on studies -- The Cori Report and the National Academy of Sciences Report -- recommended that Mono Lake should be sustained between 6,377 feet, which is the current elevation, and 6,390.

As Mr. Georgeson mentioned, just a few minutes ago, how much water is needed to sustain this ecosystem is, approximately 70,000 acre-feet, which is about 10% of the City's current water supply...

CHAIRMAN COSTA: ...That would put us at what level, with the 70,000 acre-feet? The blue level?

MS. DAVIS: Yes.

As you can see, the blue level, in terms of the protection of Mono Lake's ecosystem, is not perfect -- you will see dust storms continuing at Mono Lake -- but, we believe that it protects the essential elements of the ecosystem -- the productivity, protection of the gull habitat -- minimizing the air quality problems, within the Mono Basin -- important, both from a recreation standpoint, and a resource standpoint...

CHAIRMAN COSTA: ...So, the blue level gives us 6,380. Is that right -- 6,380 feet -- vertical feet?

MS. DAVIS: It would be a range, because Mono Lake...

CHAIRMAN COSTA: ...Yes, it goes up and down, depending

upon the rainfall...

MS. DAVIS: ...It goes up and down, yes...

CHAIRMAN COSTA: ...Sure, I understand.

MS. DAVIS: There are, we believe, reasonable alternatives. We've been an advocate of a "wet year-dry year" plan, for managing Mono Basin diversions. Clearly, the City of Los Angeles needs the water most during "dry years". If the lake level is maintained at the higher end of the range during "dry years", the lake level can drop, and the City of Los Angeles can divert most of the water, except what's needed to protect the fisheries and the streams.

As a way of sharing the water between the Mono Basin and the City of Los Angeles, water conservation is clearly a very important way of solving the problem. Mayor Bradley currently has a water conservation program in the City of Los Angeles, projected at saving 10% of the water supply, which could be used as a replacement source.

Third, as Mr. Georgeson mentioned, we are working with the City of Los Angeles, through the UCLA program, and also with the State of California, the Forest Service and Mono County, to see if we can come up with a creative solution to this problem -- an alternative, which would replace Mono Basin diversions.

Finally, I'd like to address the public trust questions:

One: Without the public trust doctrine, we would not be here today with the City of Los Angeles, seeking a constructive solution to the problem -- one that would meet the needs of protecting a very important resource, one that had been left out

of the equation, back in 1940, when the Water Board first gave the City of Los Angeles its permits to divert water from the Mono Basin.

Two: Many times, this issue has been characterized as a case of birds versus people, or fish versus people, or resources versus people. It's clear that the people need the water for domestic purposes; they also need these resources. And the goal here is to try and find a balance of these kinds of beneficial uses that ensure that we have these resources, and future generations do, too. The public trust doctrine is the key to seeking that balance. We see it as being a very important part of it.

CHAIRMAN COSTA: Thank you, Miss Davis.

MS. DAVIS: Thank you.

CHAIRMAN COSTA: I have a question, as it relates to you, to the comments that have been made here, most of today. You've been here most of today, is that correct? At least, this afternoon?

MS. DAVIS: Sure.

CHAIRMAN COSTA: Part of your handouts you provide -- the Herald Examiner article or editorial -- that says, "Draining Mono Lake" and then it has a subtitle on that, that says, "L.A. Has To Find Other Water Sources". We always include conservation; but, I think you and I might agree that, in spite of what aggressive additional conservation efforts we take, there are still demands that must be fulfilled.

The public trust doctrine had a tremendous impact upon

the attempt to get the recognition to maintain this valuable resource and to protect it. Without the public trust doctrine, the situation would be dramatically different, as it relates to Mono Lake, today. Would you not agree?

MS. DAVIS: I would concur.

CHAIRMAN COSTA: You would concur. So, we agree that the public trust doctrine is very important to Mono Lake. I think it's important, and I suspect you would agree that it's important to the rest of the state, as well.

We discussed the need to balance competing uses this morning. Fortunately, or unfortunately, I'm one of those public policy officials who has to try to deal with satisfying those competing uses. How would you take care of L.A.'s problem?

MS. DAVIS: In our analysis, the first place we started was to ask the question, "Is there a better way to manage the diversion, and is the way to share the water between Mono Lake and the City of Los Angeles?" The answer is, there are some very creative things that can be done in the Eastern Sierra, such as a "wet year-dry year" program that's attached to a specific lake level, where Mono Lake resources are protected, and then finding a way to manage the diversions. To the extent that we can address the City's real needs, which are particularly water, during "dry-year" periods, how do you make sure that the resource is protected, and that you bring the water to the City?

There are things within the Eastern Sierra that have been discussed, in terms of taking a look, for example, of expansion of a reservoir in the Eastern Sierra, to see whether or

not, provided you have the protections for the resources in the Eastern Sierra, if you would expand that reservoir, you could actually pick up some water that is currently spilled during "wet-year" sequences. Approximately 15,000 acre-feet, on average, might be an increased yield from the aqueduct. With a different management scheme, it has as a part of it -- protection of the resources in the Eastern Sierra. So, I'd start there.

Then, the second place I'd go to, as you point out, is conservation -- looking at ways in which you can improve that, because it's the most cost-effective way, I believe, of using a resource. It's the analogy you make with what has happened with automobiles and energy. After the 1974 energy crisis, we were able to make our automobiles so much more energy-efficient. It's a way of stretching existing supplies; we're in agreement on that.

The third way, I think, has been very interesting; that is, emerging out of our discussions with the City of Los Angeles, is the possibility of identifying voluntary sellers of water in the San Joaquin Valley, where, if through conservation, you can help resolve some problems, such as selenium problems in the San Joaquin Valley, by reducing the amount of water that's being applied on agricultural lands. Whether that might be water that then can also be brought down as a replacement source of water...There has been a lot of talk about that as a possibility; I think it has to be approached very carefully.

CHAIRMAN COSTA: Easier said than done.

MS. DAVIS: Perhaps; but, that's one of the avenues that we're exploring.

CHAIRMAN COSTA: The only problem with that argument...That's not the only problem; there are other problems with that argument...But, most of those in the valley -- and I'm somewhat familiar with that because I'm from the area -- argue that they're in a deficit area. But, I mean, there are a lot of other problems, as well.

MS. DAVIS: There are clearly some issues there that have to be addressed, particularly in the protection of the valley's environment.

CHAIRMAN COSTA: All right.

Does the panel have any other comments or advice you want to give the Committee on how we deal with this issue next year, as we apply the public trust doctrine throughout the entire state? How do we provide water supplies for the state? How do we make more out of less?

MR. FLINN: No, sir, except that we recognize the challenge, I believe, that's facing, frankly, not only this Committee and the Legislature, but all California citizens, as we have to confront the realities of our water situation -- not that that's any help.

CHAIRMAN COSTA: Not comforting.

Thank you very much.

MR. FLINN: Thank you.

CHAIRMAN COSTA: All right. Moving right along...

We now have our second panel for the afternoon, the issues panel on balancing California's diverse water needs: We have the very able Thomas J. Graff, the Senior Attorney for the

Environmental Defense Fund; Mr. W. F. "Zeke" Grader, the Executive Director for the Pacific Coast Federation of Fishermen's Associations; Mr. B. J. Miller, Consulting Engineer; and Jan Stevens, Assistant Attorney General, who has just come back from Oregon, I understand, and did a very effective job with a group of experts in that discussion of the public trust doctrine up there.

MR. JAN STEVENS: Thank you, Mr. Costa.

CHAIRMAN COSTA: The first speaker will be Mr. Thomas Graff, providing us with the information and advice necessary to balance California's diverse needs, taking into account not only the public trust doctrine, but all the other factors that we're attempting to deal with.

Do you have some sure-fired suggestions here, Mr. Graff?

MR. THOMAS GRAFF: I hope so.

Thank you, Mr. Chairman, for inviting me here to testify.

It has been a long day, I know, for the Committee, and for you, Mr. Chairman; so, I will try to be brief today. And, of course, I'm willing to respond to questions that you may have.

What I brought with me today -- and I've just given you, Mr. Reeb and others -- is an article that I wrote. It's really a derivation of a speech I gave, and it was published in the UCLA Journal of Environmental Law. You'll note, it is a legal journal, but the article has no footnotes, and that is because my command of legal doctrine is dimming, as I spend too much time up here, and with newspaper reporters.

The topic today, though...

CHAIRMAN COSTA: ...How do you spend all that time with those newspaper reporters? That's what I want to know.

MR. GRAFF: The topic, however, that you've assigned to me and the others on the panel today is not, at least, directly the public trust doctrine; it is balancing California's water needs. I wanted to begin by saying that I'm for it.

CHAIRMAN COSTA: Good. So am I.

MR. GRAFF: But, as we all know, balancing California's water needs is in the eyes of the beholder. From the perspective of the Environmental Defense Fund, let me tick off a few of the major environmental resources of the state that we believe are not yet getting their due.

Mono Lake has been discussed in great detail today, and so has San Francisco Bay, the Delta and the Estuary. Let me mention as well, the Trinity River, wildlife refuges of the Central Valley, the Sacramento River and the American River.

I might add, with respect to the American River, I have a little supplement to the answer to the question that Assemblyman Isenberg asked of Mr. Moskovitz, as to cases involving raising the public trust doctrine. The case of EDF, Save the American River Association, the County of Sacramento, supported, I believe, by the City of Sacramento and its counsel, Mr. Moskovitz, against the East Bay Municipal Utility District, of course, also raised as the public trust doctrine, on behalf of the American River.

Lastly...I don't mean to put this last, because, in a way, it's the environmental resource that's most threatened in the state, and has had the most damage done to it -- the San Joaquin

River. I know, Mr. Chairman, you and I have been leaders in working imaginatively, and diligently to protect the San Joaquin and improve that environment.

Now, other sectors in California have legitimate concerns about water availability, about water quality, about the cost of water development, and the cost of water. EDF has spent a good deal of its time in recent years working with some of these interests, in an attempt to respond to their concerns, as well as to some of those environmental concerns that I ticked off at the beginning of my remarks.

For example, in 1985, we approached the Congress with the Westlands Water District, in an effort to obtain funding for some crash studies that would look at potential methods of treating the subsurface agricultural drainage problems that are bewildering Westlands and other westside districts.

Also, in 1985-1986, we approached the Congress with many other interests in the state -- successfully, as it turned out -- to pass legislation implementing the Coordinated Operating Agreement between the state and federal governments and, in the process, assuring that the federal government would comply with water quality standards properly adopted by the State Water Resources Control Board for the San Francisco Bay-Delta Estuary.

CHAIRMAN COSTA: We appreciated your leadership in that role.

MR. GRAFF: We're involved now in a two-year joint study with the Metropolitan Water District of Southern California.

CHAIRMAN COSTA: Let me ask you a question, kind of

parenthetically, that just came to mind: Were you here this morning?

MR. GRAFF: I was here, on and off.

CHAIRMAN COSTA: I don't know if you heard the comment by Mr. Potter, when he was talking about not just the COA, but the Suisun Marsh Agreement, as well. He was concerned by the impact that the staff's recommendations might have, and the implications that it might have on the Suisun Marsh Agreement that had been reached, because it would change the "water-year" type, and it might undermine some of the agreements that had been reached. Were you here for that?

MR. GRAFF: No, I didn't hear Mr. Potter's remarks; but, I've heard that argument already made by others representing contractor and project interests. I haven't actually seen the parts of the opinion of the Board report -- staff report,...

CHAIRMAN COSTA: ...staff report...

MR. GRAFF: ...I guess you should properly call it; at least, we've been instructed in that way today.

What I've heard -- and I haven't looked back at the Suisun Marsh part of the agreement -- is that, in fact, the staff did not recommend the protections for the tidal wetlands and other Marsh interests that we thought were required, in addition to what was provided in the agreement. I might say that, as I understand that agreement -- and I'm not an expert on it -- it was kind of in lieu of the standards that were set by the Board in 1978; it was kind of an effort to see if a physical solution could be devised that would replace the need for flows to meet the Marsh's

objectives. It was always intended -- at least, in 1978...That's why a strong outflow standard was set: If that didn't work, that water would be provided for the Marsh's needs, as the physical solution didn't work. Now, the first thing that happened, if we all recall, is that when the physical solution came in, it came in sideways -- or tilted.

Leaving that aside for a moment, the critical issue is, are the Marsh's needs being met by that physical solution? If they are, fine; water may not be needed for the purpose. But, our experts are telling us that there are values in the Marsh that are not going to be met by that physical solution, and therefore, other objectives are required.

CHAIRMAN COSTA: Okay, please go ahead.

MR. GRAFF: Although I don't think the staff actually went as far, or even close to as far, as what we asked for on that.

CHAIRMAN COSTA: You're unhappy, too, with the staff.

MR. GRAFF: Of course.

CHAIRMAN COSTA: You can use this afternoon as an opportunity to cite some of your grievances.

MR. GRAFF: Hammer away. Well, I don't know.

CHAIRMAN COSTA: I try to run a fair hearing, Mr. Graff.

MR. GRAFF: No, I appreciate your...

CHAIRMAN COSTA: ...Everyone has an opportunity to list their complaints.

MR. GRAFF: Let me list the good things we're doing first: We have been active in working with the Berenda Mesa Water

District, in Western Kern County, in an effort to help them with their economic problems, as they have a very expensive water supply which they can't fully utilize, and they're trying to eliminate some of the institutional objectives.

CHAIRMAN COSTA: You've done a lot of good things. You've been active with the MWD, and the Imperial Irrigation District.

MR. GRAFF: The last thing is the Mono Lake group, which was just referred to. We've been putting a lot of time in recently with the City of L.A., the Mono Lake Committee, the Forest Service, the County of Mono, and the Department of Water Resources, under the auspices of the UCLA Extension School of Public Policy.

So, what I think I want to say, having ticked off some of these concerns, and then willingness to work in concert with others, is that we stand willing in 1989, to work with you and the other Members of the Committee in the Legislature, to address the environmental problems and the other problems of the water sector in California. We do hope that the Committee will take an attitude that is really one of balance, and that it will recognize that the historic imbalance has been one which has been ignored, up until recent times -- the environmental values that I mentioned -- and that, on the whole, has responded to the values of the consumptive users.

So, sure, we have to worry about their problems, as we continue into the 1990's and beyond; but, the problems that have, as yet, not received sufficient attention, in our judgment, are

those of the various environments that I mentioned.

CHAIRMAN COSTA: I think I understand your argument. From the late 1800's, certainly, until 1970, there was little recognition of the need to protect the environment, and it has only been in the last 15 years or so that there has been a focus and a direction in that area. And I know that you feel sincerely, as do many other people, that there needs be an appropriate balance, because of the previous imbalance.

A couple of quick questions: Do you think we ought to modify or provide greater clarity, as it relates to the public trust doctrine?

MR. GRAFF: I think it's pretty early to tinker with that. My sense is that there has been, really, one major case, the Mono case, which has gone off on that doctrine. Most of the other matters that have been discussed are being handled, really, by the courts, on the basis of other provisions of the Water Code, the Fish and Game Code, or whatever -- and the public trust doctrine is almost an afterthought. If you look at that staff report, it doesn't rely heavily on the public trust doctrine; it really relies on reasonable use.

CHAIRMAN COSTA: Yes. I think everyone has argued today that most of what the Board has been doing has not relied heavily on the public trust doctrine, and that they would probably be on the same course today, whether or not there was a public trust doctrine.

MR. GRAFF: That's the sense I get. I think if the Legislature is going to concern itself with water matters next

year, the public trust doctrine is not the place to look.

CHAIRMAN COSTA: You've attempted to be helpful in a host of different regional water problems, as they exist today, and you cited many of them; you used the Berenda Mesa Water District as an example. But, if we were successful at attempting to deal with it, and made that supply available, vis-a-vis water marketing, how does that address our deficit question, when the State Water Project, in terms of its un-met needs, is significantly below the levels that it has attempted to provide for the contractors? Why should MWD, for example, look at Berenda Mesa as their source, when, in fact, they haven't been able to receive their full supply as a contractor from the state?

MR. GRAFF: Let me address that one first, and then the other one second.

If the MWD doesn't want to buy from Berenda Mesa, that's fine; but, there are other interests in its service area who are interested and, in fact, have expressed very strong interest in purchasing Berenda Mesa water supply. They were, in essence, "shooed away".

CHAIRMAN COSTA: Kern County Water Agency doesn't want to see that water go out of its service area.

MR. GRAFF: Well, that's another problem. But, in terms of Southern California interests, there are interests in Orange County who I think would be happy to pay top dollar for that water, if only they could get their hands on it.

As to the State Water Project's interest in additional water supply, I would argue that if we could really get water

marketing going in this state, and get rid of some of these institutional obstacles that exist -- as in the case of Berenda Mesa -- the State Water Project would find some pretty inexpensive water supplies to buy out there that would be a lot better as a means to supplement its current shortage -- apparent shortage -- than building such potential projects as Auburn, or even Los Banos.

CHAIRMAN COSTA: Okay. Let me ask you the same question that I asked Miss Davis -- and it was probably an unfair question to ask her...

If L.A. must look elsewhere for their water, and we continue to have tremendous competition for that very valuable resource, and we try to balance those needs...? If the State Board's staff's plan were to be implemented, we create additional shortages in areas where some people believe shortages already exist. It's unclear to me, for example, in the case of the Central Valley, how we take hundreds and thousands of acre-feet of water out of there, unless you assume that in doing so, you're going to take with that a significant portion of land that's currently in irrigation at this time.

MR. GRAFF: Well, I think the overdraft problem is a very important one and a difficult one. Thinking back a year ago, what was the controversy? Then, I think it was the Department of Water Resources -- an issuance of a bulletin which, basically, accepted the overdraft as a fact of life and didn't really address it, and said, "Well, economics will probably be what drives the solution to that problem." And I think that's pretty much where

the Board has left the problem with the recent staff report.

I do think when one addresses the L.A. problem from a water supply perspective, though, one ought to remember that it has an absolute legal right, as we understand it, to a fair share -- indeed, some may argue more than a fair share -- of MWD's, partial entitlement to State Water Project supplies, that the other interests in Southern California, in some senses, are at greater risk than is Los Angeles, because L.A. taxpayers have been paying, I would argue, "through the nose", over the years, basically, to provide water to their neighbors, in terms of the contributions they've made to MWD's State Water Project purchase for very little water supplies.

So, really, I think the one kind of modification I would make of Martha Davis' answer, is that the MWD is a potential place for Los Angeles to go for an alternative supply, recognizing that that's potentially expensive, there may be alternatives, and that from an environmental perspective, it might be better if one could find other water supplies which solved other environmental problems, such as, potentially, some of the westside districts' selenium problems.

CHAIRMAN COSTA: One last point: Going back to the Berenda Mesa proposal, you talked about the barriers that exist. What barriers are you talking about?

MR. GRAFF: Well, you mentioned the biggest one, I think -- Kern County Water Agency. The other two are probably MWD and DWR.

CHAIRMAN COSTA: You mean, the contracts that exist?

MR. GRAFF: Yes, I think those contracts, and the provisions in them that...

CHAIRMAN COSTA: The Water Code prevents the Legislature from amending contracts. You're aware of that.

MR. GRAFF: I'm not sure that's right...Well, maybe it is.

CHAIRMAN COSTA: Section 12934 of the Water Code, precludes the Legislature...

MR. GRAFF: ...I don't recall that exact provision of Burns-Porter...But, my understanding of the way the courts, in the early cases, in interpreting Burns-Porter, ruled...They, basically, would look at the practical effect of the efforts of the Legislature to respond to the concern that, I think, the Burns-Porter original drafters had, that the state shouldn't "monkey" with what our solemn obligation is to those bond holders.

I would argue that, from a purely financial perspective, the current policy, which threatens bankruptcies -- in Berenda Mesa and other westside districts -- is not in the interest of those bond holders; indeed, the best way to shore up any potential threat to the financial interest of those bond holders is to allow the marketing to occur, to bring in new, "fresh blood", who have more economic clout to support the project.

CHAIRMAN COSTA: Well, that's really what we've been arguing about all day today -- the concept of the public trust doctrine, not only in retrospect, but prospectively; it allows you to look in a different way of any contractual obligations that previously have existed, to supersede that with a concept that

involves the public trust, when it's involved...

MR. GRAFF: ...Well, I think the Legislature should take a look at those contracts, to see whether the absolute provision -- apparent potential prohibition -- that exists in them to prevent marketing is inconsistent with the policies that the Legislature has promoted in favor of marketing and, if necessary, amend those.

CHAIRMAN COSTA: If you really want to play "The Devil's Advocate", we could say that maybe we ought to just let Berenda Mesa "go under" and save the water. Right?

MR. GRAFF: Well, somebody is going to have to "pick up the tab"; I don't think Kern County is all that enthusiastic about it...(LAUGHTER)...

CHAIRMAN COSTA: ...I can't find anybody who is enthusiastic about it.

All right.

Any other comments?

MR. GRAFF: No. Thank you very much.

CHAIRMAN COSTA: Thank you -- always a pleasure.

Our next witness is Mr. Zeke Grader. You're going to tell us what we ought to be doing next year to balance the diverse water needs of this state, and what your thoughts are on the public trust doctrine.

MR. W. F. "ZEKE" GRADER: Thank you, Mr. Chairman.

I particularly want to thank the Committee for holding this hearing on this issue, and really express my appreciation to you, Mr. Costa, for your leadership in this whole area of water

policy in this state.

For the record, my name is Zeke Grader. I'm the Executive Director of the Pacific Coast Federation of Fishermen's Associations. We represent 24 different commercial fishermen's organizations, along the U.S. Pacific Coast. Among others, we represent all of California's organized commercial salmon fishermen.

We will be submitting, for the record, written comments. What I'd like to do here today is just give you some brief comments. I realize it's getting late in the afternoon.

I want to point out, at the outset, that we've heard from a lot of other water users this morning; my membership are also water users, in that they harvest, annually, an irrigated crop. This irrigated crop is, perhaps, a little bit different than others, though, because it depends on that water being instream for the irrigation.

We've heard a lot in the recent months -- particularly since the Racanelli decision and now, most recently, with the publication of the State Board's staff report on the Bay-Delta hearings -- about the public trust doctrine. Frankly, I'm a little bit amazed about it, because looking at the public trust doctrine, it goes back in California to the time of statehood when, in fact, the state was given authority over navigable waters and the land beneath those. It's really nothing new. Of course, at that time, it extended to commerce, navigation and fisheries. Quite naturally, it has been expanded, particularly under Marks v. Whitney in 1972, to fish and wildlife and recreation. It's not a

"boogeyman"; but, it's really just a natural evolution of law in this state, as we have become more and more urbanized.

The public trust doctrine does not give a preference, as we read the case, to public trust resources. What it simply requires is that there be a balancing between instream uses -- instream values -- and those out-of-stream. That, I think, is where we've really seen a failure of public policy, here in California; that is, the failure to give balance between the existing instream values and the transfer of those to out-of-stream private uses. Those instream values, of course, include economic values -- those that are easy to measure -- such as commercial fisheries, which we can give a ready economic value to, as well as those other commercial values, which also have an economic value -- but are a little bit harder to determine -- such as sport fishing and tourism, as well as extending to nonmarket values; that is, values for wildlife and other things that the public wants to have in place.

I think, in part, the problem with the failure of policy in this state has been, basically, our obsession with out-of-stream needs, to the detriment of existing instream uses. It's sort of as if we had, as children, a very good toy and, upon seeing another one, decide to simply drop our toy and break it, in return for another that was of, perhaps, less value. I think that's where we have been in this state; we have dropped and broken some of those "toys", in return for others of, perhaps, dubious value. Indeed, I think when measuring between the existing instream values and the out-of-stream uses, we never seem

to gather the facts we need to do the balancing.

I'd like to talk a little bit about the San Joaquin River. In 1959, for example, the State Water Resources Control Board said that it is not in the public interest to maintain the salmon fisheries in the State of California. It did not do any balancing, in effect; they did not take into consideration the economic value of that resource -- that salmon resource; they did not take into consideration its impact upon coastal economies; they did not take into consideration its impact on the sport fishery; they did not take into consideration its nonmarket values. As a result, they dried up the river, and nearly wiped out that entire resource, with the exception of its tributaries.

In 1978, of course, we had the "D-1485" Decision. Of course, that was a step in the right direction, if you're considering just fishery values, because it did provide for some additional flows. However, again, there was no balancing in it. Indeed, had there been some balancing, we might have received the greater flows that were necessary for the protection of those fishery resources.

Now, in 1987, we're in the midst of the Bay-Delta hearings; again, we do not see the type of balancing that is required. For example, economic values are really not discussed at all, and were pretty much rejected during the portion of the hearings. I think if we're going to do a good "balancing act", we're going to have to take into consideration those economic values, whether they be market, which are easily obtainable, such as commercial fisheries, or nonmarket values...

CHAIRMAN COSTA: ...Mr. Grader, you said sufficient opportunity wasn't made to take into account...

MR. GRADER: ...No, there was some economic testimony presented; but, in the staff report, it's really not alluded to. There's a great deal of discussion -- the discussion in the staff report is "peppered" with words, such as, "reasonableness" -- but, really, no time...Back to what is reasonable in the fisheries, when they're saying, "It's not reasonable to maintain a salmon fishery in the San Joaquin River..."

CHAIRMAN COSTA: ...Would you like the opportunity to have the Board extend the time, under Phase I, or as a part of Phase II, to allow...

MR. GRADER: ...Probably, as a part of Phase II. I think greater consideration...

CHAIRMAN COSTA: ...for additional testimony to be submitted -- or evidence...?

MR. GRADER: ...Well, I think, if they would, perhaps, just consider some of the evidence that was presented...I know the Bay Institute, for one, did present some of these nonmarket values. To get that into the record and have it adequately considered, I think, is critical...

CHAIRMAN COSTA: ...Is your argument that the evidence was submitted and wasn't reflected upon, or is your argument that additional evidence needs to be considered?

MR. GRADER: ...No, I don't think additional evidence, Mr. Chairman...I think it's the former; that is, it has to be adequately considered. That's what we did not see by the staff

when it developed its report -- considering the economic aspects of those fisheries. They did consider, for example, both Fish and Game's and U.S. Fish and Wildlife Services' determinations on what flow needs were required; but, they should have tied that, as well, to what the economic values are, so you can have a full balancing by the Board, as required, we believe, under a public trust basis.

CHAIRMAN COSTA: What else don't you like about the staff report?

MR. GRADER: Okay. On the determination of what are reasonable uses, is it really reasonable to deny water to fish, when, perhaps, you're sending that water to some crops that would exist only by virtue of the fact that they receive subsidized water, and, furthermore, only get to the "farm gate" -- that is, only get to market -- by virtue of federal price supports? Whereas, you compare that with a crop, such as salmon -- which, this year, in California, was in excess of $100 million -- which required no subsidy...And, I should say that we didn't have to send the Governor to Japan to sell this crop; the Japanese and the Europeans were over here, attempting to buy it. It is a crop with value.

This is the type of balancing you really have to take a look at. Is it reasonable to irrigate certain lands, where the irrigation waste water coming back is poisonous to wildlife? Is that reasonable? This is the type of balancing that needs to be done. I'm not here making a value judgment; but, I think that's the duty of the Board, and they've got to consider this -- it's

our feeling -- under the balancing required by the public trust doctrine.

Now, we've heard, furthermore, that a number of these various water projects would be at risk, under the public trust doctrine, if it's applied the way that some of the speakers here, earlier this morning, alluded to. I just want to state that, as far as our fishery resource in this state goes, it is constantly at risk, not as a result of this public trust doctrine, but the way the existing laws have been applied. It has been constantly at risk.

There really has been no balancing; this is the other problem with the report. The report would provide for flows for fish -- the additional 1.5 million acre-feet between April and July in normal years -- in "wet years". In "dry years" -- or drought years -- there is no "sharing of the pain"; it is the fish whose water is cut back. There are no similar cutbacks on other uses. This is what we're simply saying here, that there needs to be, as well as a balancing -- a reasonable test; there needs to be a "sharing of the pain", to the extent that we're cutting back on everybody. In other words, if the fish are going to have to conserve water and do with less, then other users should also, if we determine that those fish -- that crop, for example -- have the same value as, say, an out-of-stream use. That's really where I think there has been a failure with the staff report, in assessing and determining how we should do that "sharing of the pain."

CHAIRMAN COSTA: You're arguing that under the doctrine of reasonable use -- or beneficial use -- under Burns-Porter, that

ought to be changed. Is that correct?

MR. GRADER: Yes. In other words, there has to be a sharing of water shortages.

CHAIRMAN COSTA: And you don't think the staff's recommendation to the Board goes far enough, in sharing that burden...

MR. GRADER: ...No, we do not...

CHAIRMAN COSTA: ...under "dry years"?

MR. GRADER: That's correct.

CHAIRMAN COSTA: ...You do like their recommendations to correct the reverse flows during surplus years?

MR. GRADER: Yes, obviously. I think, perhaps, putting a cap on what further can be taken out of the system, so we can be assured that we have that water there...

I would agree with Mr. Littleworth, that there is no balancing in the report, except I would, perhaps, look at it from a different side. I would also agree with him on the needs for certainty; however, I'm not certain that there is any certainty in this world...

CHAIRMAN COSTA: ...Well...

MR. GRADER: ...A majority of Americans...Go ahead...

CHAIRMAN COSTA: ...No, go ahead...Well, I think we all understand that. It's just that everyone makes that statement; then, after they make that statement, they tell those who they elected to public office to get them as much certainty as they possibly can, realizing that it's an uncertain world we live in...

MR. GRADER: ...Well, I'm just reminded of the fact

that, as voters...The majority of the voters in this country, two weeks ago, voted for their candidate, certain that they were going to get no new taxes. And now, a surprise...

We would like to see some certainty, too, here. I think what, perhaps, needs to be looked at is a determination that there is some minimum instream flows set aside; of course, as came out of the Governor's Report of a decade ago, that was never done -- providing for certainty for fish and wildlife with a minimum amount of flows.

Also, I agree with Mr. Littleworth about the management of public trust resources. Really, what we've seen, I think, in the past, is that there has been no management; there has been a mismanagement, in the sense that we've failed to provide them with the flows that are needed.

I think where we have a disagreement with Mr. Littleworth -- a significant one -- is on the fact that he said that there are other ways to provide for salmon, other than water. We're not sure how, because these fish have not yet developed lungs or legs. We have attempted, in this state -- really, for the past 40 years -- to provide for that resource, without water, and it has failed.

I should say that, during the rainy years following the winters of 1984 and 1985, and the flood of 1986, we did get good flows in the river; we've seen the benefits of that. Indeed, this last year, we had a record harvest of salmon, as a result of those good flows that we had; in fact, this past season, we enjoyed the best commercial fishing season that we've had in this state since,

at least, 1945 -- if not back to the 1930's.

CHAIRMAN COSTA: ...What do you attribute that to?

MR. GRADER: We attribute that directly to the high flows -- particularly the Valentine's Day Flood in 1986 -- that got those fish out of the rivers, and past the pumps in the Delta. We had flows in the San Joaquin for the first time ever since Friant Dam. We had fish coming back to the San Joaquin this year, as a result of that. So, I think it's pretty indicative that flows do make a difference, and our attempts in the past to do without flows simply have not worked.

There was an analogy made this morning, to rivers and freeways. Well, I think the difference is that a freeway is something of concrete, and a river provides for life. While you could probably argue that there are wildlife and animals out on the freeways, really, the only thing that we've seen that's akin to the wildlife, as we describe it in our various codes, are a lot of dead skunks.

There was also an analogy made to football here, this morning. Again, I think that, perhaps, that's a good analogy, except that we're not talking here about changing the rules; I think, really, what we're talking about with the public trust doctrine is instituting an "instant replay". What we're seeing on that "instant replay" is that in nearly every "play", salmon have been "face masked". So, I think that's really the football analogy...

CHAIRMAN COSTA: ...Mr. Grader, that's the advantage of spending all day here -- sitting back there...(LAUGHTER)...getting

a chance to think how you're going to respond to all these comments...

MR. GRADER: ...I do appreciate the fact that you put me on near the last, Mr. Chairman...(LAUGHTER)...After having to listen to that, that's one of the few...(LAUGHTER)...pleasures that does come from having to sit in the hearing, all day.

I do want to conclude that the public trust doctrine, as far as we see it, does not give a preference to public trust resources; it only requires a balancing. That, indeed, is what we have to have. That's where the failure of our public policy has been in the past -- in not providing for adequate balance.

Thank you.

CHAIRMAN COSTA: Thank you very much, Mr. Grader. While we haven't always agreed, I think you know that I am as concerned as you are that we make the effort to improve the salmon fisheries, and a host of other fisheries, in this state. We have made some progress; I think you're correct. PCFFA has gone a long way toward acknowledging that the perception needs to be created that our fisheries are important. Too often, in the past, we've forgotten about them.

I'm not concerned so much about the public trust doctrine as I am about attempting to balance the needs that the State Board is currently looking at. I find a real diverse opinion from folks.

I do appreciate hearing your comments.

MR. GRADER: Thank you.

CHAIRMAN COSTA: All right. Moving along...

B. J. Miller.

MR. B. J. MILLER: Thank you, Mr. Chairman and Members of the Committee. I'm flattered to be here...

CHAIRMAN COSTA: ...Are you?

MR. MILLER: Yes...

CHAIRMAN COSTA: ...Well, we're flattered to have you here...

MR. MILLER: ...Thank you...

CHAIRMAN COSTA: ...Why don't we get to the point: How do we balance these diverse needs that we've been talking about all day?

MR. MILLER: I've handed you something that includes some thoughts on how you do that. There are some more, down here, on the table.

I've got three ideas on how you might do that a little bit better than it seems to be happening now: First, it seems to me, you've got to start with the facts, not with popular...

CHAIRMAN COSTA: ...That's a good place to start; let's start with the facts...

MR. MILLER: ...Let's take a look at some of the key "facts" -- and I would put quotes around that word that we're dealing with, as we approach this question of balancing.

One popular and important one is that California agriculture uses 85% of the water. It seems to me, this depends on how you look at it. I can look at it and come up with a conclusion that California agriculture uses 40% of the water, urban uses amount to about eight percent, and that 50% has been

dedicated to fish and environmental uses. The way I get that is, I take the north coast wild and scenic rivers, which are off-limits, and I take their average flow, and I add in the amount dedicated to fish and Delta out-flow, and I get an amount that is quite a bit more than the total water used by urban and agriculture combined.

I'm not advocating that we abandon the wild and scenic river protection, and I'm not advocating that we cut the 5 million acre-feet flow that's required, over and above un-regulated flows, to go into the bay. All I'm saying is that when you...

CHAIRMAN COSTA: ...I'm glad you're not making those arguments...(LAUGHTER)...

MR. MILLER: ...approach this issue, there are other ways to look at it, besides the one that we hear so much about.

"Fact" number two is that San Francisco Bay is dying, because of flood control and water development projects. Tom, here, writes the weekly editorial for The Chronicle, on this one...(LAUGHTER)...

CHAIRMAN COSTA: ...That's because he's spending all that time talking to those reporters...

MR. MILLER: ...This myth has a foundation that is less stable than Mt. Schuster...(LAUGHTER)...

CHAIRMAN COSTA: ...(LAUGHTER)...Thank you...

MR. MILLER: ...It rests on two fallacious notions: One is that flows into the Bay have been decreased by 60%. We now have a paper accepted for publication in a highly reputable journal that documents that, in fact, there has been an increase

in flows.

The other notion is that striped bass is the indicator species for the Bay-Delta system. I think this is nonsense; the problems with the striped bass are centered in the Delta and Suisun Bay, and I don't think any experts are saying that these problems are spread throughout San Francisco Bay.

It has also become increasingly clear -- to me, at least -- that the demise of the striped bass, since the last drought, is not the result of water project operations, but that some other factor has entered the picture in the Delta -- possibly the introduction of some new species.

"Fact" number three is that salmon populations have been decimated by flood control and water development projects, and the way to fix this is to dramatically curtail operation of these projects. As I say in the paper here, this one is a little bit tricky: First, salmon populations are stable, and have been for decades. The number of salmon spawning in the river gravels has declined dramatically, and hatchery production has offset this decline.

In my mind, this casts the issue in a slightly different light: We're not talking about trying to save an adult population of salmon that has been severely decimated. In fact, if you were able to increase the number of adult salmon that spawn in river gravels -- which I think is a good idea -- and maintain a number of hatcheries, you're going to, at least theoretically, have even more adult salmon out there than we have had for years and years...

CHAIRMAN COSTA: ...Well, we have made some progress: We have a small run -- a beginning of what we hope will be an annual run -- on the Merced River, and we are improving, we believe, on the other tributaries on the San Joaquin. But, I think Mr. Grader's argument is forceful: With the nine dams and reservoirs on the San Joaquin, and with the completion of Friant Dam in the late-1940's, we virtually eliminated a significant portion of the salmon, after that time. Now, to my knowledge, that push of the salmon run has never been replaced. Are you arguing that it has?

MR. MILLER: No, no. I'm not arguing that at all.

The way you usually hear this salmon issue is without discussion of the total adult population, and without discussion of the role of hatcheries. The impression you get from listening to the way this argument is characterized is that we don't have very many salmon out there, anymore -- we've got 90% less salmon. It seems to me that we've got a problem with salmon, and it's a serious problem. But, the problem is not "number of adult salmon"; it's not that there aren't enough adult salmon out there for people to catch -- commercially or recreationally. We've got a problem, in that there aren't as many salmon spawning in the river gravels as we used to have. That's a bonafide problem; but, it is a problem of a different nature than the way it's usually characterized...

CHAIRMAN COSTA: ...But, the fact of the matter is, if we produce more salmon, there's a market for them, and we would be that much better off...

MR. MILLER: ...That's a good idea. It's a good idea. I'm not arguing that it's a bad idea; I'm arguing with the way the problem is characterized, and with the opinion that grows up from that sort of characterization.

The fourth "fact" is that California agriculture is nothing but big corporate farmers buying cheap subsidized water, growing subsidized crops and producing toxic agricultural drainage.

CHAIRMAN COSTA: Who makes that argument?

MR. MILLER: I can't remember his name; I thought I saw him here earlier. But, therefore, the way to balance California's water needs is to take the water from agriculture, because they don't deserve it anyhow, and give it to cities, Owen's Valley, and to fish. Now, I think this idea of water transfers from agriculture to urban users is a good idea. It is happening, and, I think, we're going to see more of it. But, I don't think it's the solution to balancing California's water needs.

CHAIRMAN COSTA: Partial solution?

MR. MILLER: It's a partial solution, yes. This characterization of California agriculture, which is a political and a public relations precondition of taking its water, is grossly misleading, and agriculture is just finally now beginning to react to this sort of thing. The thing I don't ever hear talked about, when you're talking about transferring large amounts of water from agriculture to urban users, is the potential of serious social consequences. I don't hear anyone talking yet about the social effects on scores of Central Valley communities

of taking water from the surrounding agricultural lands.

So, my first principle for this balancing would be to start on a firm, factual basis, rather than on popular rhetoric or old emotion-laden positions.

The second principle I'd apply is, you've got to look at all the options. This is one of the major problems I have with what the State Water Board staff has done -- arbitrarily ruling out a whole host of options.

My third principle is that balance requires cooperation. It's pretty clear that this is not going to be a "win-lose" deal on either side. So, I'd presume here that success depends on cooperation, and I'd take steps to encourage, if not require, that such cooperation takes place.

On the question of legislation, I have a modest proposal in that regard. I've now gone over this State Board draft plan. I have some real problems with it. The major problem I have with it, in terms of how it's put together is that the staff seem to be arbitrary. I agree with Mr. Grader even greater. I'd like to see the things he was talking about laid out in this plan, so that we can all take a look at them. I'd like to see some other things laid out in the plan.

So, if the Legislature were going to do something, it seems to me, you might set forth in more detail just what it is the Board should consider in making such far-reaching decisions as this one. If you also wanted to provide some guidance on how they...

CHAIRMAN COSTA: Excuse me, Mr. Miller.

How would you feel about this, Mr. Grader -- the comment that Mr. Miller just made?

MR. GRADER: I would like to see some further looking at economics.

CHAIRMAN COSTA: How about you, Mr. Graff?

MR. GRAFF: I think you ought to give us greater direction. If it had been done before the hearing, I agree, actually, with both Mr. Grader and Mr. Graff, that there is inadequate justification for a lot that's in the report. But, when I think about what Mr. Grader has just been saying about economics, I recall having been in Fresno -- your home town -- and hearing the Chairman of the Board rule out of order testimony about subsidies, because they were beyond the scope of the proceedings.

Again, it depends on "whose ox is being gored". And I think it's quite risky, from a public policy point of view, to insert the Legislature in the middle of a proceeding and say, "Take more evidence into account", or whatever. I think the oversight function that you're performing here is probably getting the message over there a couple of blocks, and I'd guess they're going to be more careful, come the final report, in laying out more of their conclusions and bases for their conclusions, probably, without need for legislation.

CHAIRMAN COSTA: Sorry to interrupt you, Mr. Miller.

MR. MILLER: Sure.

CHAIRMAN COSTA: Please go ahead.

MR. MILLER: At this stage of the Board proceedings, I

think I, amazingly enough, would agree with Mr. Graff, if you are going to jump in here and try to tell them, "No, no, no. Don't do this." But, if the proceedings drag on -- and there are possibilities in that regard -- and it gets all hung up in the turmoil that's bound to occur, then, I think, maybe some sort of legislative intervention that, at least, laid out for the Board, "Look, here are the things you must consider; here are the ways to go about this kind of planning without prejudging the recommendations", would be helpful.

That's it.

Thank you.

CHAIRMAN COSTA: So many comments have been made here today, as it relates to trying to balance those needs. I'm just wondering, Mr. Miller, is it your understanding that the second phase of the Board's hearings will provide recommendations for the third phase? Is that correct?

MR. MILLER: That's correct.

CHAIRMAN COSTA: What opportunity will the various interests that have testified here today have to impact the Board's decision-making when they reach the third phase?

MR. MILLER: Well, we'll have lots of opportunity. I mean, we all had lots of opportunity in Phase I. Lack of opportunity doesn't seem to me to be the problem. The problem, as I see it, is that we all came to the Board, we all had a lot to say, and we all had some definitive policy basis for the types of recommendations that we were making. We didn't agree, obviously, on those matters. The thing that concerns me is that so much of

this was just tossed out without justification. I can go through and give you some examples of that, but that will just make us go later; I mean, I've got so many of them.

CHAIRMAN COSTA: A lot of people have been giving me examples from all sorts of view points in the last week.

MR. MILLER: So, it's not opportunity that we are lacking.

CHAIRMAN COSTA: What I'm having a hard time with trying to understand is, how do we know that they haven't considered? Because they're not included in the draft report could mean they considered them and rejected them.

MR. MILLER: Well, I think even if they did consider and reject them, they have an obligation to put it in writing, so that others know what their reasoning was.

CHAIRMAN COSTA: Okay. Thanks for that clarification.

Our last witness on this panel is Jan Stevens, Assistant Attorney General, who, for those of you in the audience who may not be aware, just came back from Oregon last weekend. He participated in a forum whose primary topic was the "public trust doctrine," and he added his comments, as it relates to that. I hope you'll share some of those comments with us this afternoon.

MR. STEVENS: Thank you, Mr. Chairman.

I appreciate your patience, and perseverance, and the length of this hearing, and the fact that there are a number of people who would also like to testify, who do not need designation by the Attorney General for standing to comment on the public trust, as the legislation may ask -- you would have required --

(LAUGHTER)...and I'm happy to recognize that right of theirs.

I'll boil down the 15 minutes of tightly-reasoned commentary that I had in the interest of the day and...

CHAIRMAN COSTA: The Committee, the audience, and the panel will be most appreciative.

MR. STEVENS: Thank you.

Basically, there are about four points that I'd like to make. Several of them have been expressed in one form or another by previous witnesses, and I'll be even briefer on that.

The first is that the reasonable expectations of the users of water under the National Audubon decision should not be deemed to have been greatly changed or disappointed, because, basically, the rights to use water in California have historically been subject to the regulation -- the continuing authority of the state. And this has existed since the state acquired its waters in 1850, as a state, and it was recognized in 1886 by the Gold Run decision, which dealt with the ability of the state to prevent people from using their waters, as they viewed them, to diminish the public interest in the waters of the State of California. We think there is basically nothing new in that; it was expressed several times in early decisions involving California waters, and also waters elsewhere.

I was exposed to a quotation from Justice Holms that I thought was particularly relevant. In the early days of this century, he said, "(INAUDIBLE) public interests are as obvious as the interests of the state in maintaining its rivers substantially undiminished. The private property of riparians cannot have

deeper roots and the power to appropriate cannot substantially diminish the public welfare and interest in these waters."

I would not think that that would be a surprise in the form of National Audubon and even in California's existing water system under Article 10, Section 2, because, since 1928, the state has had this power of continuing authority over the use of waters. Concerns were voiced over the extension of National Audubon, or its application, perhaps, to beneficial uses, such as nonnavigable waters, stored waters, ground waters and waters in place. Basically, this is the extent of jurisdiction that the state has already had, under the Article 10, for many, many years. Therefore, we don't believe that it's proper to think that an unnecessary extension of state power has been exerted here.

The second point has to do with the contention that Audubon has given rise, or will give rise, to irresponsible and frivolous litigation which will impair or, perhaps, bring down, California's water system. Our experience today with National Audubon has been that this is not the case and that the mechanism which has been worked out by the Board and the courts, in connection with implementing National Audubon, has been working out pretty well.

The crux, I think, of the Audubon decision was the Court's observation which repeated several times that no responsible body had ever taken a look at the impairment of the public trust that would result from the grant of the licenses and permits in the case of Mono Lake. This was repeated several times, and the Court took pains to reaffirm the fact that the

state has continuing authority, power and duty to exercise this kind of continuing supervision over public trust usage -- usage which changed with circumstances, just as beneficial usage has been defined by the Legislature, and given increasing guidance in past years.

It's not necessary to bring up here what the Legislature has done over the past years in defining fisheries and water conservation and wildlife and its beneficial usage, designating wild and scenic rivers as being entitled to special consideration, and the usage in those rivers as being of highest priority. And I think that this kind of consideration has been extended to the water system and, as you indicated, Mr. Chairman, in the Delta report, the Racanelli decision. Much of the discussion was really based on factors independent of public trust considerations which exist as a concurrent basis for this continuing authority; but, probably the same result would have been reached, regardless. The Audubon decision simply reaffirms the continuing authority of the state to reexamine usage of water, in light of public usage.

With respect to the legislative proposals that have been made, as I said, we haven't seen an onslaught of what we consider frivolous litigation. There have been some recent pieces of general legislation which deal with (INAUDIBLE), the ability to impose sanctions now under (INAUDIBLE) procedure 1021.5 for frivolous litigation. And basically, none of the issues which have been raised in AB 4439, with one possible exception, appear to us to be worthy of long consideration.

CHAIRMAN COSTA: What's the exception?

MR. STEVENS: The exception might be the feeling, which was also expressed by several justices in Audubon, that maybe public trust considerations are something that can't be looked at by the Water Board profitably at the initial stage; but, it might be desirable to have some kind of uniform interpretation of the applicability of this, within the context of the water right system, which is really what the Audubon decision is all about.

CHAIRMAN COSTA: Based upon the fact that they have much more experience, and have the entire statewide picture, as a whole, to look at, and they're a better entity to try to get those kinds of responses, as opposed to a court on a case-by-case decision. Is that your reason?

MR. STEVENS: That's very possible. Yes, the Board is familiar with this, and chances are, we'll have to deal with the subject, anyway, because it's going to come up in the context of adjudication, or the reconsideration of the reasonableness, of a particular diversion. We didn't like the particular approach in the bill of doing that; it would have required a reference back to the Board and, in effect, would have given people two "bites" -- one in the Board and one in the Court in which the action originated -- before any kind of decision would be made intelligently. As I said, otherwise, basically, the cases...

CHAIRMAN COSTA: So, you might be willing to look at some legislation which contains that provision?

MR. STEVENS: We'd be happy to look at such a proposal and consider it. Otherwise, pragmatically, the cases that have arisen in which any kind of interim relief has been granted,

minimum flows have been imposed that worked out on the basis of interim relief -- minimum flows for a certain time -- appending studies by the Department of Fish and Game and other responsible bodies. And it may be that this system is one which is sort of working itself out in a very practical way, and will solve some of the concerns which have been voiced by water users here today.

Other than that, unless there are questions, I think that summarizes our present feelings in the matter.

CHAIRMAN COSTA: Do you believe the State Board has the authority to balance competing uses -- to take water away from an established use, to the degree that it would impact the ability of a water user to generate power, or serve its customers?

MR. STEVENS: Yes, we definitely do, and I think that Audubon coordinates that clearly, too. They said that it would be disingenuous of us to disregard the needs of our water -- and I assume, power -- of large urban areas, and the facilities and the projects that have been built in alliance on that; but, they're going to require consideration of the public trust, as well -- a continuing obligation of the state. And the Board, I think, would have the authority to make appropriate adjustments along those lines.

CHAIRMAN COSTA: Public trust notwithstanding?

MR. STEVENS: Public trust notwithstanding, or public trust included -- a necessary factor.

CHAIRMAN COSTA: Final question: Do you have any recommendations for us, during this next two-year session, as to what we ought to be doing to make your job easier, or to try to

balance the diverse needs that we see here before us?

MR. STEVENS: I appreciate the request. I think that it's something we (INAUDIBLE)...

CHAIRMAN COSTA: It's your shot; you're "at the plate".

MR. STEVENS: Yes, right...(LAUGHTER)...Our budget people aren't here today, but aside from that...(LAUGHTER)...

I do believe that there will be considerable work to be done, and that the interest of this Committee, and its concerns, are appreciated.

I think that we can look at certain things, based on streamlining of the implementation of this procedure, without emasculating it. And if we can assist the Committee in that kind of a goal, we'll be delighted to.

CHAIRMAN COSTA: You don't think we ought to "sit on the sidelines" and provide that oversight rule that Mr. Graff suggested?

MR. STEVENS: I think you're doing it now -- a very good job of it.

CHAIRMAN COSTA: Would you recommend that we set aside instream flows through legislation, or allow the Board to do so?

MR. STEVENS: I think that the Board has considerable authority now, with respect to the allocation of water, and the Audubon Court has given it additional direction; of course, the Legislature has, too, in its definition of beneficial usage, and in priorities. The extent to which the actual process of setting aside flows is an additional thing that ought to be undertaken. I really couldn't comment on it now. I think that's an additional

"bite", and a really big one. It goes beyond National Audubon.

CHAIRMAN COSTA: All right. Any other questions or comments, members of the panel? Is there anything you'd like to add?

Well, obviously, the time is late, and you've been very patient. Thank you very much.

We have two witness here who have signed on, as I indicated earlier this morning: Mr. Gene Toffoli, from the Department of Fish and Game -- their legal counsel; and I don't know who the second person is. Who is the second person? Who is the other person?

MR. GENE TOFFOLI: Thank you, Mr. Chairman.

I'm Gene Toffoli, Department of Fish and Game.

There's very little I can add to the discussion on public trust. We will present you with a written commentary on the evolution of public trust relationship, specifically, to Fish and Game. We have a little different approach in direction than that specifically discussed here today. The flavor of that is that, in California, there has been a parallel development, we believe, of the public trust for fisheries, and that in discussing the evolution on water rights, we've told there is case law that speaks of public trust in the fishery, that predates Fish and Game Code, predates statutory authority, and also predates the water law that was enacted, in order to look at beneficial usage and allocate water rights.

The cases: One, Truckee River, specifically, talks of the public trust in the fishery. This was a nuisance case; that

was 1892. The other one is the People v. Glen Colusa Irrigation District, and that, specifically, designates or speaks of the trust for fishery, in relationship to water rights. The spinoff from that is that the Fish and Game Code, which is enacted statutorily by the Legislature, and the public trust law that has been developed through court precedent, we believe, gives a very strong position to the consideration of fishery, in relationship to water, or water rights, or water allocation in any direction that you go.

The existing statutory scheme in California is that the Department reviews all water rights, under Section 1243 of the Water Code. We look at permits, review them, and make recommendations for conditions. If we can't come to some kind of agreement with the proponent for the water right, we may then protest. That goes to the formal hearings before the Board.

We also are involved in negotiations with state, federal, municipal, and other agencies, in regard to the coordination-cooperation aspect of implementing both statutory and regulatory responsibilities under the Fish and Game Code. Particularly important, I believe, is the aspect of water flows for fisheries pre-1914 for the issues of water allocation, or pre-1914 and pre-1928, because then we get into the realm of public trust -- public trust for fisheries, prior to a real consideration for some of the out-flow requirements for fishery considerations.

I believe, in some of the ongoing litigation mentioned today -- Audubon, some existing cases regarding Rush Creek -- the

Department has been either a coordinator, or an on-the-scene-type coordinator, or maybe "dragged kicking and screaming" into the fray from public interest groups that have an interest in litigation. I believe that the balance in the future is going to be the statutory law in the books now -- the regulations that we work under -- this balancing between the regulatory and statutory requirements.

I do think that the public values, as they change and as they put pressure on various agencies, particular agencies, like Fish and Game, will require either a different interpretation of the code, or, at least, the promulgation of the code in our duties as we see them -- and public groups may see them differently. I think that the courts are going to, eventually, kind of create the sideboards, as to how we interpret the code sections, how far the regulations can go, and, I think, how far the Legislature can go in formulating public trust.

CHAIRMAN COSTA: You're saying the courts, not the Legislature?

MR. TOFFOLI: Well, what I'm saying is, the Legislature is fulfilling its role now and, I believe, has been fulfilling it. It's providing the ability in statutory law and regulations promulgated by those authorities that the Legislature designates. I think that's the way it has been going, and it looks like it has been somewhat effective. But, I do think that the courts are going to put the sideboards on any significant deviation from the public trust that's in the law, as far as case precedent, as far as that's concerned, if anybody tries to deviate too much from

those protections.

CHAIRMAN COSTA: You seem to also be arguing, Mr. Toffoli, that notwithstanding the public trust doctrine, that given the current cases -- you sighted the 1914 and 1928 -- and other legislation since that time, that this balancing of needs would still be required by the State Board, notwithstanding the public trust doctrine, or the Audubon decision. Is that true?

MR. TOFFOLI: Yes, I believe that the vehicle for accomplishing that is within regulations of the State Board, and also those separate authorities that have been provided to the fish and game community, by the Legislature, as enacted in the Fish and Game Code. I believe there are some parallel authorities that may, at times, run up against each other; but, they're in there for the same purpose. There may be a little different interpretation. So, I can see in the future, possibly, that the Department of Fish and Game could disagree with the State Water Resources Control Board, in a public trust issue; but, I think it can be resolved in the format of a regulation.

CHAIRMAN COSTA: So, you think the State Board would be where they are today, without the National Audubon decision that was rendered? Is that what you're saying?

MR. TOFFOLI: I don't think their role would have been so clear, and as defined, today, as it was; but, I believe that the direction would have been going the same way, because of the previous development in case law and precedent on public trust -- not called "public trust", per se, in the sense of appropriating water.

CHAIRMAN COSTA: Okay. Have you had a chance to look at the staff's preliminary report?

MR. TOFFOLI: No. Just what I've heard today is about as much as I've heard on the Delta report.

CHAIRMAN COSTA: Then you probably wouldn't be able to tell us what impact you think it would have on the 4-Pumps Agreement, which the Department had signed, or the Suisun Marsh Agreement, which you signed, as well. I guess what I'm trying to solicit from you is whether or not you think any of the staff recommendations in this report would undo any of the achievements that you have made in the 4-Pumps Agreement, or the Suisun Marsh Agreement.

MR. TOFFOLI: I really can't answer that, in any kind of a quantitative way. I better not, to stay out of trouble.

CHAIRMAN COSTA: One last question: Are you satisfied with the input that the Department has had in the first phase of this process with the State Board?

MR. TOFFOLI: I believe the Department is satisfied. We've had a lot of input to it, and I believe we were well prepared.

CHAIRMAN COSTA: Very good...

MR. TOFFOLI: Thank you...

CHAIRMAN COSTA: ...Thank you very much.

We have two other witnesses: Mr. John Beuttler, with the United Anglers. John, are you here?

Mr. Dick May, with Cal Trout?

There was some question -- not today, but, I guess, last

week -- as to whether or not we would provide everybody an opportunity to testify. I always try to run a fair hearing; I certainly want to make sure that anyone out there who felt that maybe they didn't get an opportunity to testify, has this opportunity.

Okay. I don't know if that's a fact that you felt satisfied that all your comments were taken into account, or if you just don't like testifying at this time of the day. I want you to know that I am certainly prepared to be here and to listen, if you have any added points.

Those of you who have some comments, but are not prepared, at this time, to submit those, we will be taking written testimony until December 12. So, if you would like to provide additional evidence to the Committee for the transcript, we would be more than happy to receive that information, just as the State Board has been doing, under Phase I.

So, I want to thank you for your patience and your time. The Water, Parks and Wildlife Committee hearing, as it relates to the public trust doctrine, is concluded, at this time.

I wish you all a very pleasant Thanksgiving, with you and your families, and a Happy Holiday Season.

We'll see what this hearing portends, as it relates to legislation, next year.

Thank you very much for your time and patience.

This hearing is adjourned.

# # # # #

JIM COSTA, CHAIRMAN
WATER, PARKS, AND WILDLIFE COMMITTEE

GOOD MORNING!

THIS HEARING OF THE ASSEMBLY WATER, PARKS & WILDLIFE COMMITTEE IS CALLED TO ORDER. FOR THOSE OF YOU WHO DON'T KNOW ME, I'M ASSEMBLYMAN JIM COSTA, CHAIRMAN OF THE COMMITTEE (INTRODUCE OTHER MEMBERS).

THE HEARING IS BEING RECORDED AND A WRITTEN TRANSCRIPT WILL BE PREPARED. PLEASE IDENTIFY YOURSELF FOR THE RECORD WHEN YOU BEGIN YOUR PRESENTATION. IN ADDITION, WRITTEN TESTIMONY WILL BE ACCEPTED AS PART OF THE OFFICIAL RECORD OF THE HEARING UNTIL MONDAY, DECEMBER 12TH.

OUR SUBJECT TODAY IS "PUBLIC TRUST DOCTRINE APPLICATION TO WATER RIGHTS." DEPENDING WHAT SIDE YOU TAKE, THE PUBLIC TRUST DOCTRINE IS EITHER A THREAT TO THE APPROPRIATIVE RIGHTS SYSTEM WE HAVE HERE IN CALIFORNIA OR IT REPRESENTS THE WAY TO MODIFY WATER RIGHTS PERMITS OR LICENSES GRANTED BY THE STATE PRIOR TO THE 1950S; CERTAIN FISHERY AND OTHER PUBLIC TRUST RESOURCE PROTECTIONS HAVING BEEN PLACED INTO LAW AT THAT TIME.

WE HAVE A LENGTHY AGENDA TODAY. I HAVE ONE ADDITION. AT 4:30 P.M. OR THEREABOUTS, GENE TOFFOLI WILL MAKE A PRESENTATION ON BEHALF OF THE DEPARTMENT OF FISH AND GAME. THE SERGEANTS WILL HAVE A SIGN-UP LIST FOR THOSE PERSONS WISHING TO TESTIFY AFTER 4:30 P.M.

I ALSO UNDERSTAND THAT HOWARD MARGULEAS EXPERIENCED PLANE TROUBLE AND WILL NOT ARRIVE UNTIL ABOUT 10:30. THE PANEL ON THE BAY-DELTA HEARINGS WILL THEREFORE MOVE UP TO HIS POSITION ON THE AGENDA, AND WE WILL HEAR FROM MR. MARGULEAS BEFORE NOON.

ON OUR PANEL PRESENTATIONS TODAY, I'D LIKE TO HAVE THE INDIVIDUAL PANELISTS MAKE THEIR PRESENTATIONS, AND THEN HAVE ALL FOUR PERSONS COME UP FOR A QUESTION AND ANSWER PERIOD.

(COMMENTS FROM OTHER MEMBERS?)

OUR FIRST WITNESS, THEN, IS GEORGE GOULD.

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LAW OFFICES OF
BEST, BEST & KRIEGER

ASSEMBLY WATER, PARKS AND WILDLIFE COMMITTEE

November 21, 1988

Hearing on Public Trust Issues

My name is Arthur L. Littleworth. I am a senior partner of the law firm of Best, Best & Krieger, and am Counsel for the State Water Contractors in the current Bay-Delta proceedings before the State Water Resources Control Board. The State Water Contractors organization represents the various public agencies that have contracts with the State of California to take water from the State Water Project ("SWP"). More than 17 million Californians living in all parts of the State depend upon the SWP to meet all or part of their water needs. State Project water now flows to Napa, Solano and Alameda Counties, to the rapidly growing South Bay area, comprising a significant part of the San Jose area's supply; for agriculture and domestic use in the San Joaquin Valley; and below the Tehachapis from Ventura to San Diego. While The Metropolitan Water District of Southern California is the largest contractor in this area, twelve other public agencies in Southern California also hold State Water Project contracts.

I have been asked to discuss today the Public Trust Doctrine as it may apply, or efforts to attempt to apply it, in the current Bay-Delta proceedings. As you know, the State Board is now in the middle of a three year process to develop a new

Water Quality Control Plan for the Delta and San Francisco Bay, and to review water rights in connection with the implementation of that Plan. These proceedings are not limited merely to the State and Federal projects. The Courts have directed the Board to take a "global" approach, and to consider in the process all major users that impact Delta supplies.

It is important to note that the present State Board proceedings are not aimed merely at protecting beneficial uses in the Bay-Delta, but rather are required to provide reasonable protection for all beneficial made of Delta water. In short, these proceedings are required to protect city and farm uses of Delta water, as well as fish and wildlife uses within the Delta and Bay.

In developing a new Water Quality Control Plan, the State Board is proceeding under the Porter-Cologne Act. (Water Code, Section 13000 et seq.) This basin planning process has been in the law for many years, and does not depend upon the Public Trust Doctrine. Indeed, the State Board would probably be proceeding just as it is doing even if the Supreme Court had never integrated the Public Trust Doctrine into California water law.

The Porter-Cologne Act, in Section 13241, requires the Board to establish water quality objectives that will ensure the "reasonable protection" of beneficial uses. The Racanelli

decision (182 Cal.App.3d 82) gives the Board "wide authority" to attain the highest water quality ". . . which is reasonable, considering all demands being made and to be made on those waters and the total values involved . . ." (Page 109, Water Code Section 13000) The objectives in the Plan are to provide reasonable protection, consistent with "overall statewide interests," and considering "all competing demands for water." (Racanelli, pages 116, 118) A balancing process is necessarily involved to the extent that enough water is not always available to meet the needs of all uses.

In the Bay-Delta proceedings, however, some of the parties representing environmental interests have tried to skew the balancing process. They seek a preference for instream uses, and they rely upon the Public Trust Doctrine to support that position. One environmental coalition,[1] for example, argues that the State Board must "adopt a demonstrable bias in favor of resource protection." They contend further that protection of trust resources must be afforded "greater weight" than other aspects of the "public interest"; that the Board must establish standards "which are sure to protect public uses"; and that California law now requires the Board to deny "environmentally destructive consumptive uses." (Closing Brief for Bay Institute of San Francisco, pages 6, 15, 81)

1/ This group includes the Bay Institute of San Francisco, the National Audubon Society, the Sierra Club, the Bay Area Audubon Society, the California Native Plants Society, Citizens for a Better Environment, the Point Reyes Bird Observatory, and the Save the San Francisco Bay Association.

The California Department of Fish and Game has also argued that fish and wildlife uses should have a "higher priority" than meeting export needs. Moreover, the Policy Statement of the League of Women Voters, dated November 10, 1987 and filed in the Bay-Delta proceedings, recommended that public trust uses be accorded a "separate and special validity over the other beneficial uses of the estuary." (Page 5)

Thus, major efforts are being made to expand the Public Trust Doctrine as enunciated in the Audubon decision. The Supreme Court, in National Audubon, did not grant a preference to public trust values. It consistently used the same language of current statutes, namely, that the public trust uses must be "considered" and "taken into account" in allocating water. (33 Cal.3d at 426, 444, 446, 447, 448, 452) The Court stated that the Public Trust Doctrine, as part of an "integrated system of water law," imposed a "continuing duty on the state to take such uses into account in allocating water resources." (33 Cal.3d at 452) That is all the Court said. It did not intend to overturn statutory law by granting a preference to trust values. The Public Trust Doctrine simply offered the means of reaching the City of Los Angeles, and all older appropriators in similar circumstances, and of assuring continued supervision over the exercise of water rights.

Environmentalists often cite Audubon as holding that the State has a duty to "protect public uses whenever feasible." (33

Cal.3d at 446) They generally omit, however, the Court's further statement found in the same paragraph that the State as a matter of practical necessity "may have to approve appropriations despite foreseeable harm to public trust uses." Often neglected also is the statement that California's population and economy "depend upon the appropriation of vast quantities of water for uses unrelated to instream trust values," and that the State Board has the power to grant permits to take water from a flowing stream for uses in distant parts of the State "even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream." (33 Cal.3d at 446)

In the recent Draft Water Quality Control Plan released by the staff of the State Board on November 4, large additional spring flows are recommended for fish. The staff's recommended Plan calls for average April-June flows for salmon based upon the historical period of 1930-87. For striped bass, the Plan recommends reducing spring exports to the 1953-67 average. All in all, the staff seeks 1.5 MAF of additional spring outflow for the benefit of fishery resources. (1-11) This additional water is intended to come from Sacramento River reserves of 360,000 acre-feet, conjunctive use and changing reservoir operations on the San Joaquin to provide 530,000 acre-feet, and decreasing spring exports from the Delta by 670,000 acre-feet. (1-11)

While the State Water Contractors disagree strongly with these recommended flows, nonetheless the recommended Staff Plan does not appear to rest upon a public trust preference as the legal basis for the recommendations. Instead, the Board Staff claims to have struck a reasonable balance among all competing uses for Delta waters. Factually, and from a policy point of view, the State Water Contractors disagree, but the point here is that the issue of the high flows can be taken to the State Board to determine finally what is "reasonable," and this can be done without a legal claim that these historic flows for fishery resources must be met first before city and farm needs are satisfied. I think the Committee can see that the statewide results could be potentially disastrous if the Public Trust Doctrine were in fact applied to give a preference to instream uses over the needs of farms and cities. Present law requires an even-handed balancing, and that should not be changed to favor fishery needs.

Finally, I want to mention the "California Water Ethic" that underlies the staff's Bay-Delta recommended Plan. This water ethics calls for extensive management of water use. It includes substantial municipal, industrial and agricultural conservation; reclamation; conjunctive use; having all water users share responsibility for Bay-Delta objectives; the construction of new physical facilities; and pollution control. Significantly, however, no mention is made of efficient management of environmental uses.

The public trust uses of water, like consumptive uses, are subject to the reasonable use provisions of the State Constitution. (National Audubon Society vs. Superior Court, 33 Cal.3d 414, 443) Efforts to conserve and to seek alternatives to Delta flows apply not only to urban and farm uses, but equally to fish and wildlife uses. A management approach is the only path that holds promise for the long-term resolution of water issues. The satisfaction of environmental needs solely by increasing flows is not a reasonable policy for this State. The "California Water Ethic" must also include the management of public trust uses. This concept must embrace consideration of such non-flow measures as construction of facilities, habitat restoration, fish screens, changes in project operations, hatchery production, improved hatchery and stocking operations, fishing regulations, and the use of groundwater for some wildlife uses.

Public trust uses cannot be granted a preference, nor exempted from the management responsibilities imposed upon all other uses of water.

PUBLIC TRUST DOCTRINE APPLICATION TO WATER RIGHTS[1/] AND TO BAY-DELTA HEARING

WATER, PARKS, AND WILDLIFE COMMITTEE

The Board has implemented established water right policies, which also served to implement the public trust doctrine, for many years. In the Bay-Delta context, the Court of Appeal in the "Racanelli" decision said that the Board in the 1978 Bay-Delta decision complied with the public trust doctrine as the doctrine is described in the Mono Lake case, even though the Board acted five years before the Mono Lake decision, and the Board's decision does not refer to the "public trust". We believe that previous decisions regarding the Delta also complied with the public trust doctrine, even though these decisions were not characterized as public trust actions, and were based on other legal theories.

The point is that the public trust does not add significantly to the Board's authority to put terms and conditions on water right permits and licenses. While it adds another legal theory for the lawyers to use in defending a Board decision that protects public trust resources, it does not change the thrust of the basic decision. Like conditions imposed under the other laws, any conditions imposed under the public trust doctrine must be reasonable in light of all the circumstances, including other beneficial uses of the water.

1/ Presented by Walt Pettit, Chief of the Division of Water Rights, State Water Resources Control Board.

The other laws we routinely apply in this area include Water Code provisions which for about 30 years have recognized fish and wildlife protection as beneficial uses of water, and required their protection in water rights allocation decisions. Likewise, protection of the public interest is a long-standing requirement in the Board's decision making. Since the early 1970's, compliance with the California Environmental Quality Act has required a consideration of alternatives that is analogous to public trust balancing. The constitutional prohibition against waste and unreasonable use or diversion has been in place since 1928.

Because of the prohibition against waste, a "continuing authority" term has historically been included in water rights permits and licenses. The Board also "reserves jurisdiction" over many permits to make amendments for specific purposes. The reserved jurisdiction terms are dropped when a project is licensed.

Under the public trust doctrine, the State is a trustee. When the State makes a decision affecting trust resources, it must balance public trust values with developmental interests and must protect the trust resources whenever feasible and reasonable.

The Board applies the public trust balancing to projects involving navigable waters, projects which can affect navigable waters, and fisheries.

Under the doctrine, the Board retains continuing authority over water rights to reevaluate and modify the rights to conform with the public trust doctrine.

About the only real change because of the public trust doctrine is that people can now petition the Board to undertake statutory adjudications of water rights to include consideration of public trust resources. While many people have suggested that before the Mono Lake decision, established water rights were untouchable, the Board has always retained continuing authority over water right permits and licenses to modify them in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water.

I have included, as Attachment 1, the Board's current continuing authority term. The current version includes language intended to comply with the decision in the Mono Lake case. This term is included in new permits and licenses and is substituted for the old term any time the water right is reviewed for other reasons.

In practice, the Board has not yet modified a water right solely on the basis of public trust authority. We have responded to a number of complaints which sought greater protection of fishery resources and which typically cite public trust authority as a basis for Board action. Some of those cases are still under investigation. Others have been concluded, but actions taken to date have been based upon agreed upon solutions or continuing jurisdiction to modify terms which was included in the original permits. As I stated before, other bases exist for achieving the same objectives as the public trust doctrine.

I believe the specific case of the Bay-Delta hearing is consistent with the general situation I have described.

In handing down its decision on the Delta water cases, the appellate court said the Board had done a couple of things wrong, or incompletely, in its 1979 decision. For example, it said the Board had to adopt water quality objectives that reasonably protect all beneficial uses of water, not just those beneficial uses that can be protected by conditioning water rights. This point was based on the water quality statutes, not the public trust. The court also said that the Board should make all water rights holders share the burden of meeting objectives, not just the CVP and SWP.

The Board has additional vehicles for modifying delta requirements. Existing permits of the CVP and SWP were, at the time of issuance, heavily conditioned to allow for changes resulting from the many ongoing studies. Therefore, it is unlikely at this point that the next Board decision on the Delta will impose any conditions that rely solely on public trust authority.

By way of a status report, the Board staff released a draft pollutant policy document and a draft water quality control plan for salinity on November 3. Those reports will be used as the basis for testimony by all the parties in the next hearing which will commence on January 9.

That concludes my presentation; I'll try to answer any questions you have.

ATTACHMENT 1

PERMIT TERM 12

Title: Continuing Authority--Water Rights

When Used: All permits

Term: Pursuant to California Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view of eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) to installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Sec. 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

STATEMENT ON PUBLIC TRUST IN WATER ISSUES
Presented By
HOWARD MARGULEAS, CHAIRMAN
CALIFORNIA CHAMBER OF COMMERCE*
To The
ASSEMBLY WATER, PARKS & WILDLIFE COMMITTEE
CHAIRMAN, ASSEMBLY MEMBER JIM COSTA
Sacramento, California
November 21, 1988

GOOD MORNING MR. CHAIRMAN AND MEMBERS. MY NAME IS HOWARD MARGULEAS. I AM THE CHAIRMAN OF THE BOARD OF DIRECTORS OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CHAIRMAN AND CHIEF EXECUTIVE OFFICER OF SUN WORLD INTERNATIONAL. WE APPRECIATE THIS OPPORTUNITY TO EXPLAIN WHY WE CO-SPONSORED AB 4439 WITH THE ASSOCIATION OF CALIFORNIA WATER AGENCIES. JOHN FRASER, THE EXECUTIVE DIRECTOR OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, IS WITH ME THIS MORNING SO THAT WE CAN JOINTLY RESPOND TO YOUR TECHNICAL QUESTIONS ON THE PUBLIC TRUST DOCTRINE.

WE UNDERSTAND THE ENVIRONMENTAL CONCERNS INVOLVED IN THIS ISSUE AND AGREE WITH THE IMPORTANCE OF PROTECTING CALIFORNIA NATURAL WATER WAYS, WILDLIFE AND FISHERIES. THERE ARE STILL, HOWEVER, SEVERAL MAJOR REASONS WHY WE ASKED THAT AB 4439 BE INTRODUCED.

ONE REASON IS TO TELL THE PUBLIC IN HEARINGS SUCH AS THIS THAT THE PUBLIC TRUST DOCTRINE REPRESENTS A REAL THREAT TO WATER SUPPLIES FOR OUR CITIES AND INDUSTRIES AND FARMS. IT ALSO CREATES UNCERTAINTY WHETHER WE CAN EXPAND OUR WATER SUPPLIES. LEGISLATION IS NEEDED TO RESTORE AN ELEMENT OF CERTAINTY FOR THE PUBLIC'S WATER SUPPLY.

LET ME BREAK DOWN THE PROBLEM BETWEEN EXISTING AND NEW WATER SUPPLIES. WATER DEVELOPMENT SYSTEMS ARE NOT UNLIKE OUR TRANSPORTATION SYSTEM. THEY ARE EXPENSIVE, EXPECTED TO LAST DECADES, AND THEY ARE PAID FOR LARGELY THROUGH USER FEES, WHETHER IT IS A GAS TAX OR A MONTHLY WATER BILL.

IF AN ENVIRONMENTAL ORGANIZATION BROUGHT A LAWSUIT TO SHUT DOWN A MAJOR FREEWAY BECAUSE THERE WAS TOO MUCH NOISE AND POLLUTION IT WOULD NOT BE UNLIKE PUBLIC TRUST CLAIMS AGAINST EXISTING WATER RIGHTS. IF EITHER CLAIM WAS SUCCESSFUL THERE WOULD BE A HUGE LOSS TO THE ECONOMY. NEW HIGHWAY ROUTES AND WATER SUPPLIES WOULD HAVE TO BE FOUND.

THE PROBLEM WOULD BE MORE SERIOUS FOR THE WATER INFRASTRUCTURE, HOWEVER, SINCE REPLACEMENT WATER MAY NOT BE AVAILABLE.

THE ONLY SOLUTION TO A SUCCESSFUL ENVIRONMENTAL CLAIM AGAINST AN EXISTING WATER PROJECT MAY BE RATIONING. I AM SURE YOU WILL HEAR ABOUT RATIONING ALTERNATIVES FOR EXISTING WATER SYSTEMS IN YOUR PANEL DISCUSSIONS LATER IN THE DAY.

MY NEXT POINT DEALS WITH DEVELOPING NEW WATER SUPPLIES TO MEET POPULATION AND ECONOMIC GROWTH. THE PUBLIC TRUST DOCTRINE SAYS THERE ARE NO VESTED WATER RIGHTS UPON WHICH A COMMUNITY CAN RELY. ANY EXISTING OR NEW PROJECT IS FAIR GAME FOR AN ENVIRONMENTAL LAWSUIT TO TAKE AWAY THE WATER RIGHT AT ANY TIME.

I WILL GO BACK TO THE FREEWAY ANALOGY. WOULD ANYONE SERIOUSLY CONSIDER FINANCING AND BUILDING A NEW FREEWAY IF OPPONENTS COULD FILE AN ENVIRONMENTAL LAWSUIT AND SUCCEED IN CLOSING THE FREEWAY AFTER IT IS BUILT? IF ONLY A POSSIBILITY, THE DECISION MAKERS WOULD HAVE TO SERIOUSLY CONSIDER THEIR POTENTIAL LIABILITY FOR PRUDENT USE OF PUBLIC FUNDS.

FOR NEW WATER PROJECTS UNCERTAINTY IS THE PROBLEM. HOW CAN WE BUILD A CANAL, ENLARGE SHASTA RESERVOIR, OR BUILD AUBURN DAM IF A NEW COURT INTERPRETATION OF THE PUBLIC TRUST DOCTRINE TEN YEARS FROM NOW REQUIRES RELEASE OF THAT WATER TO SATISFY NEW ENVIRONMENTAL CLAIMS?

THE UNCERTAINTY OF WHEN A PUBLIC TRUST CLAIM WILL BE MADE CREATES A UNIQUE PROBLEM FOR FINANCING NEW WATER SYSTEMS. FOR MOST WATER PROJECTS BONDS ARE ISSUED. FINANCIAL INVESTMENTS ARE MADE. THE PUBLIC TRUST DOCTRINE MAKES THOSE INVESTMENTS RISKY WITH TWO CONSEQUENCES: THE COST OF MONEY WILL EITHER GO UP OR THE MONEY WILL NOT BE AVAILABLE AND THE PROJECT WILL NOT BE BUILT. THUS THE MAJOR PURPOSES OF THE BILL WERE TO PROVIDE SOME CERTAINTY FOR BOTH EXISTING AND NEW WATER SUPPLIES AND TO BRING THIS POLICY ISSUE BEFORE THE LEGISLATURE.

MY THIRD POINT IS THAT IT IS NOT FAIR TO SAY THE ONLY WAY TO PROTECT FISHERIES AND THE ENVIRONMENT IS THROUGH THE PUBLIC TRUST DOCTRINE. THERE ARE DOZENS OF STATE AND FEDERAL LAWS WHICH PROTECT THE ENVIRONMENT. BUT THOSE LAWS, WHEN SATISFIED, WHEN COMPLIED WITH, SET THE STAGE FOR FINANCING AND PLANNING THE PUBLIC WORKS PROJECTS. THE PUBLIC TRUST DOCTRINE UPSETS THE PLANNING AND FINANCING. WE BELIEVE THE LEGISLATURE SHOULD TAKE THE ROUGH EDGES OFF THIS DOCTRINE AND ESTABLISH CERTAIN GROUND RULES SO THAT PLANNING AND FINANCING DECISIONS ARE NOT MADE IN A VACUUM.

THE NEXT QUESTION IS WHO WILL PAY FOR SUCCESSFUL PUBLIC TRUST CLAIMS WHICH TAKE AWAY A COMMUNITY'S WATER SUPPLY? WATER RIGHTS ARE PRIMARILY HELD BY PUBLIC AGENCIES. IF MORE WATER MUST BE RELEASED INTO A RIVER FOR FISHERIES, SHOULD LOCAL RESIDENTS PAY DOUBLE FOR DEVELOPING NEW SUPPLIES AND FACILITIES WHILE PAYING OFF THE DEBT FOR OLD FACILITIES?

PUBLIC TRUST CLAIMS CAN BE BROUGHT AT ANY TIME AGAINST ANY COMMUNITY'S WATER SUPPLY. THIS HIT AND MISS DOCTRINE CAN UNFAIRLY SINGLE OUT ONE WATERSHED, ONE COMMUNITY, ONE PROJECT. THE LEGISLATURE NEEDS TO ADDRESS THE QUESTION OF WHO WILL PAY FOR THESE ECONOMIC LOSSES.

THE FINAL REASON THE BILL WAS INTRODUCED WAS TO REINFORCE THE LEGISLATURE'S DECISION TO HAVE THE STATE WATER RESOURCES CONTROL BOARD DECIDE WATER RIGHTS QUESTIONS.

WE HAVE A METHOD FOR CONSIDERATION OF PUBLIC TRUST CLAIMS THAT WAS PUT IN PLACE BY THIS LEGISLATION DECADES AGO. THAT PROCEDURE REQUIRES THE STATE WATER RESOURCES CONTROL BOARD TO CONSIDER FISH AND WILDLIFE NEEDS WHEN ISSUING OR MODIFYING A WATER RIGHT PERMIT.

AB 4439 REINFORCED THIS PROCEDURE AND GAVE THE STATE BOARD BROADER AUTHORITY TO DECIDE PUBLIC TRUST ISSUES. WE THINK THE STATE BOARD IS THE APPROPRIATE FORUM TO DECIDE PUBLIC TRUST WATER RIGHT MATTERS. WE OBJECT STRENUOUSLY TO THE PRESENT SYSTEM THAT ALLOWS FORUM SHOPPING AMONG THE VARIOUS COURTS OF THIS STATE.

I WOULD NOW LIKE TO ASK JOHN FRASER TO MAKE A FEW COMMENTS ON OUR JOINTLY SPONSORED BILL.

THANK YOU.

*THE CHAMBER IS A VOLUNTARY, NON-PROFIT ASSOCIATION OF PRIVATE-SECTOR EMPLOYERS. IT HAS APPROXIMATELY 3,300 MEMBERS, INCLUDING 160 TRADE ASSOCIATIONS, AND REPRESENTS VIRTUALLY EVERY INDUSTRY AND GEOGRAPHIC AREA OF THE STATE OF CALIFORNIA. APPROXIMATELY 65 PERCENT OF THESE MEMBERS ARE SMALL BUSINESSES. THE CHAMBER IS CLOSELY AFFILIATED WITH NEARLY 400 LOCAL CHAMBERS OF COMMERCE AND, THROUGH THEM, COMMUNICATES WITH MORE THAN 170,000 LOCAL BUSINESS OWNERS. THE CHAMBER ESTIMATES THAT ITS MEMBERS, AND THOSE AFFILIATED LOCAL CHAMBERS OF COMMERCE, REPRESENT THE EMPLOYERS OF MORE THAN 75 PERCENT OF THE PRIVATE WORK FORCE IN CALIFORNIA.

ACWA

ASSOCIATION OF
CALIFORNIA
WATER AGENCIES

a non-profit corporation
since 1910

November 22, 1988

The Honorable Jim Costa
California State Assembly
State Capitol, Room 2111
Sacramento, California 95814

Dear Jim:

At a meeting in Lake Tahoe this last week, the members of the Association adopted a statement on water policy that covers virtually every water issue of current interest.

I think it is important to point out that every one of the 370 members of the Association were given a copy of the draft statement and were invited to comment. Many did and we are delighted to report that the final statement was adopted unanimously last week at a meeting of our members.

This is significant since it represents a consensus among water agencies delivering nearly all of the agricultural water used in California and over 95% of the municipal and industrial water used in this state.

When a printed copy of the policy is available, we will send a copy to each member of the Legislature. For purposes of your hearing on the Public Trust Doctrine, however, I am enclosing a copy of that portion of the water policy applicable to Public Trust.

We are respectfully requesting that this statement be made a part of the record of the hearing.

Sincerely,

John P. Fraser
Executive Director and
General Counsel

JPF/cp

Enclosure

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PUBLIC TRUST

The California Supreme Court's Audubon decision in 1983 applied the public trust doctrine to the State's waters. As the public trust doctrine is integrated into California's water system, ACWA believes the courts, the Legislature and concerned governmental agencies should be guided by the following principles:

- Demand for public trust uses of water must be balanced along with all other competing demands for water without a preference or a shifting of any burden of proof.
- Once appropriative water rights have been subjected to a proper balancing of competing interests and any equitable adjustments made, then they should be issued and protected for consumptive uses, even though there may be foreseeable harm to public trust uses.
- Public trust uses must meet the same standards of reasonableness as other water uses and trustees of public trust uses must be required to demonstrate that water management principles have been applied to such uses in a manner consistent with requirements for other water uses.

- Many public trust uses are also protected by the modern water rights system, which requires balancing of the relative benefits of all beneficial uses, broad consideration of the public interest, and the exercise of continuing jurisdiction.
- Public trust limitations should not be applied to water supplies made available by man-made systems (e.g., reservoirs, and waterways conveying stored water) created in reliance upon, and for the purpose of implementing, lawfully-issued appropriative rights and adjudicated rights.
- The Legislature has the authority and responsibility to accomplish a public trust balancing and, if it does so in the future, the resulting legislation should expressly indicate that the determination encompasses the balancing process and fulfills the public trust obligation.
- Once a public trust determination has been made, subsequent rebalancing should only be conducted if significant changes have occurred.

- Public investment in and reliance on water supply systems should be given great weight in balancing the factors to be considered in making a public trust evaluation.
- A high degree of certainty is required in the establishment of water rights in order to provide the security necessary for adequate financing of required development.

STATEMENT OF ADOLPH MOSKOVITZ

BEFORE

ASSEMBLY WATER, PARKS AND WILDLIFE

COMMITTEE HEARING

ON

PUBLIC TRUST DOCTRINE APPLICATION

TO WATER RIGHTS

NOVEMBER 21, 1988

My name is Adolph Moskovitz. I am a lawyer with the Sacramento law firm of Kronick, Moskovitz, Tiedemann & Girard.

I have been practicing as a specialist in water resources law for nearly 40 years, first as a government lawyer with the U.S. Bureau of Reclamation and the California Attorney General's Office for 10 years, and then in private practice since 1959 representing public and private clients throughout California and western Nevada.

Since 1981, I have been special counsel for the City of Los Angeles Department of Water and Power in the disputes about the City's diversions from the Mono Lake Basin, including the Audubon case and other lawsuits seeking to compel reductions of those diversions based on the public trust doctrine.

My remarks today are not intended to present the official views of the Department of Water and Power. Instead, they will reflect my own perspective gained through my experience as a water lawyer and my involvement in water right disputes, including the Mono Lake controversy, in which the public trust doctrine has been raised.

I want to focus on three aspects of the public trust doctrine: its statewide significance, the uncertainty it has created, and its potential effect on the ability of water purveyors to continue to meet the needs of their users unless alternative supplies and the means to obtain them are provided.

As laid down in the California Supreme Court's 1983 Audubon decision, the doctrine applies to diversions which affect navigable waters. It therefore poses a threat to municipal supplies for every major urban area of the state, for each of them depends on water taken directly from navigable sources or from sources which flow into navigable waters. In addition to Los Angeles, the southern California urban areas all rely, to some extent, on the State Water Project's storage on the navigable Feather River and diversions from the navigable Sacramento-San Joaquin Delta. San Francisco and the Peninsula rely on the Hetch Hetchy Project which affects navigable waters from its storage and diversions on the Tuolomne River down to the Delta and San Francisco Bay. Oakland and the East Bay area rely on East Bay Municipal Utility District's storage and diversions on the Mokelumne River, which is also tributary to the Delta and the Bay, and the Sacramento area relies, in substantial measure, on diversions from the navigable American and Sacramento Rivers.

Much of California's irrigated agriculture is also dependent on the storage and diversion of navigable water. Like the State Water Project, the federal Central Valley Project stores water of navigable streams (the Trinity, Sacramento, and American Rivers) and diverts it from the Delta. Many local public agencies throughout the state have also built storage projects on navigable streams or their tributaries to provide irrigation water.

All of the users from these sources face uncertainty about the future of their supplies and the billions of dollars invested in the storage and diversion facilities which bring them their water. The basic uncertainty arises from the essence of the doctrine -- that diverted water supplies long thought to be assured under vested rights are now subject to reallocation for instream public trust uses. That is, what was once secure no longer is. But the uncertainty extends beyond that, to how the doctrine will be applied.

The first uncertainty as to the application of the doctrine concerns what kinds of uses are protected by the public trust. Public trust uses have been dramatically expanded by California courts in the past two decades. Originally, the uses protected by the public trust included only fishing, navigation, and commerce. In recent years, however, the list has been expanded to include "recreation," "open space," "units for scientific study," and "environments which favorably affect the scenery." (Marks v. Whitney, 6 Cal.3d 251, 259-60 (1971)). While it may be difficult to imagine how such an amorphous and inclusive list might be expanded further, it is clear that water rights would be subject to future further encroachment with any further redefinition of the uses protected by the public trust. As the Supreme Court held in the course of the last expansion of the definition:

> The public uses...are sufficiently flexible to encompass changing public needs. In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. (Marks v. Whitney, 6 Cal.3d at 259.)

A second uncertainty is what kinds of water rights are subject to public trust limitations. The Audubon decision dealt with

statutory appropriations; it is unclear from the basis of the decision whether the doctrine also limits other kinds of rights, such as non-statutory appropriations, riparian rights, prescriptive rights, and reserved rights.

A third uncertainty is whether there must be an impact on navigable water to trigger the doctrine. The Audubon decision emphasized that factor in enunciating the doctrine. But the Attorney General has argued in court that it applies to non-navigable streams in which fish are affected, while others have contended that it applies to all streams in the state without qualification. And what about groundwater, where it supports the growth of natural vegetation which may be impacted from the lowering of ground water levels by pumping? Except for the River Styx in Greek mythology, groundwater is not generally regarded as navigable.

A further uncertainty is whether it applies to non-natural flows or bodies of water. In recent months, the doctrine has been asserted both to require the release of stored water (in lawsuits concerning the Lower American River and the Delta) and the retention of stored water as a minimum pool for fish (in lawsuits concerning Bridgeport and Concow Reservoirs).

Finally, there is uncertainty because of the absence of any articulated standard to be used in determining whether a particular diversion should be curtailed. While the Audubon decision outlined various factors which should be taken into consideration in a public trust balancing, it provided no guidance on how the factors should be weighted against each other in striking the balance. It left the courts in the inappropriate posture of legislators to make policy

determinations of public interest based on the perceptions and values of the Superior Court judge assigned to the particular case.

Growing out of absence of articulated standards is the related difficulty of resolving public trust disputes by settlement rather than by litigating them to judgment. In the absence of standards which enable the disputants to predict with any degree of confidence the risks and potential of their respective cases, it is difficult for them to gage whether settlement is in their best interest.

Further, even if a settlement were reached between the immediate parties, there is no standard by which bystanders could judge whether the settlement yields too much ground on public trust protection. Because the private attorney general doctrine in California enables any interested person to sue on behalf of the public interest, those who disagreed with a particular settlement, or even with a final judgment for that matter, could simply file a new lawsuit challenging the same water right on the same grounds as the suit which had just been decided. There are currently no legal barriers to such a challenge, and there is certainly no shortage of environmental organizations, with different constituencies and priorities, available to mount multiple challenges.

The most disturbing prospect raised by the public trust doctrine is that a public trust balancing will result in depriving a diverter of valuable, long-used and long-relied upon water, leaving it with no available substitute supply. From a legal standpoint, in creating this prospect, the Audubon decision represented a sharp departure from the preceding century of California judicial decisions. Consistently they declared perfected appropriative water rights to be vested, permanent property rights, immune from reduction or

termination so long as the water continued to be reasonably and beneficially used. As stated by the California Supreme Court in Thayer v. California Development Co., 164 Cal. 117 (1912):

> [T]the water right which a person gains by diversion from a stream for a beneficial use is a private right, subject to ownership and disposition by him, as in the case of other private property.

Under the 5th and 14th Amendments to the U.S. Constitution, the taking of private property for public purposes may constitutionally be accomplished only upon the payment of just compensation. But the Audubon decision purported to eliminate that necessity in dealing with a water right by redefining the right. The Court said:

> The public trust doctrine...bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. (33 Cal.3d at 425-26.)
>
> [The State's continuing supervisory control over its navigable waters]...prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust. (33 Cal.3d at 445.)
>
> It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. No vested rights bar such reconsideration. (33 Cal.3d at 447.)

It was the expressed purpose of the Court to "clear away the legal barriers which have so far prevented either the Water Board or the Courts from taking a new and objective look at the water resources of the Mono Basin." (33 Cal.3d at 452.) A principal legal barrier which the decision purported to eliminate was the requirement that the taking of private property be accomplished

through the payment of just compensation. Whether removing the legal barrier in that manner complies with the U.S. Constitution is still to be tested in the U.S. Supreme Court.

The provision of replacement water supplies and the means to obtain them is important not just for legal reasons, but for practical and moral reasons as well. The communities threatened by the public trust doctrine have developed, paid for, and relied upon the priority of their water rights and water supplies for decades. To place the burden on them to replace those supplies would subject them to obstacles which they alone are probably unable to overcome. Chief among these obstacles are the decreasing availability of undeveloped or unused water (because of Wild and Scenic River designation, increased Delta outflow requirement, loss of Colorado River supply and increased groundwater contamination, for example) and the decreased ability of public agencies to finance water projects (because of the Jarvis and Gann initiatives, for example). Fairness and the public welfare require that where water supplies long relied upon are taken and reallocated for public trust benefits enjoyed by the citizens of the entire State, the State should assume the responsibility of helping those deprived to replace the lost water.

To conclude, the public trust doctrine is a potential threat to diverted water supplies serving all the major urban areas of the State as well as much of the State's irrigated agriculture. The doctrine has made insecure water rights long believed to be vested and assured. How it will be applied is ridden with uncertainty. And where it results in the reallocation of water from established urban and agricultural uses to public trust uses, it will impose on those

who are deprived not only the loss of valuable assets, but also the burden of obtaining replacement supplies.

The Legislature can alleviate the problems the doctrine has created by legislation which would reduce the uncertainties as to how the doctrine will be applied and which would provide replacement water and compensation to those whose established supplies are reallocated for public trust uses.

The Legislature is better suited to alleviate these problems than the courts. By its nature, the judicial process addresses problems case by case. Courts are bound by the specific factual situation and legal issues which come to them. It is not their role to address problems in a systematic and integrated fashion; that is the function of the Legislature. By identifying through legislation the scope and application of the public trust doctrine, the Legislature can restore some semblance of certainty and predictability to the water supplies of the State which the public trust doctrine has undermined.

MONO LAKE: PUBLIC POLICY PERSPECTIVE

Duane L. Georgeson
Los Angeles Department of Water and Power

SUMMARY

The age of firm water rights in California apparently ended with the 1983 Supreme Court public trust ruling. Today, most everyone recognizes that environmental resources will be protected and balanced with other beneficial uses of the state's water resources.

Sorting out the complex issues of public trust balancing will be a difficult task. Leaving administration of public trust reallocations up to the courts will foster a great deal of uncertainty and may not be in the best interest of the state. The Legislature may wish to consider what role it can play in bringing about a smoother, more controlled, more efficient implementation of the public trust than will occur if the issue is left to the courts. The experience of the City of Los Angeles in addressing the Mono Lake issue may be of interest in considering these matters.

GENERAL

Prior to the public trust ruling, we in the public water supply business had, or thought we had, water rights that were firm for all time. With the 1983 Supreme Court decision on public trust, we learned that we did not.

The rules have changed now, we all recognize that. Public Trust reallocations of water will occur in California. The question we all face is how to bring about and how to manage these reallocations in a manner that best serves the public interest.

I believe that a problem we face with the public trust doctrine as it now stands is that it is all up to the courts, and if we leave it entirely in the courts, then we will get different decisions from different jurisdictions, and we will get occasional extreme decisions, in both directions, that probably will not be in the best interest of the state as a whole.

Leaving the public trust entirely up to the courts fosters a great deal of uncertainty with water rights and with the water supply for vast regions of the state. Given the importance of water supply to this state and given that water management is really a shared, statewide issue, then uncertain water rights are not in the public interest.

The Legislature may wish to consider what role it can play in bringing about a smoother, more controlled, more efficient implementation of the public trust than we will get if we leave the issue to the courts.

MONO LAKE

Let me tell you what we are doing at Mono Lake. I think this case study may provide some useful ideas relative to administration of the public trust in California.

Fifty years ago, the Department thought it had firm water rights in the Mono Basin, and built facilities to exercise those rights. In 1983, of course, we learned that we did not have firm rights.

Voluminous scientific research, specifically the conclusions reached in the National Academy of Sciences report, indicates that the Mono Lake ecosystem today is healthy and productive. However, we recognize that in the future the lake will require additional water supplies to stabilize the lake at a level that will remain productive and will be useful for supporting the migratory birdlife that uses the lake.

Since 1983, the City has had to grapple with uncertainty as to its once firm water supply. The issue is in the courts, and nobody really knows what the courts will do.

To get around this uncertainty, the City has been meeting for some time now with representatives of the Mono Lake Committee, the state, the U.S. Forest Service, and Mono County to explore solutions to the Mono Lake problem. This dialogue has been substantially assisted by Professor Le Roy Graymer and Eleanor Cohen of the UCLA Public Policy Program. We believe that this sort of cooperative approach will help lead to a resolution of this difficult issue. In fact, just a couple of weeks ago our Board adopted a policy statement, included as Attachment 1, that clearly recognizes the importance of the natural resources in the Mono Basin. The Department is committed to work with the State and Federal governments to resolve the issue by obtaining a replacement water supply for Mono Lake.

I believe there is growing recognition that the responsibility for protecting the ecosystem at Mono Lake must be shouldered by not just the people of Los Angeles, but also by the State and Federal governments and other interested parties. I have included some additional background information on Mono Lake in Attachment 2.

IMPLICATIONS

The public trust is not an isolated issue affecting only Los Angeles and the Mono Basin. There are important public trust concerns statewide. As a result of years of water development, the

state's water resources have become highly interconnected. Water set aside for public trust purposes will reduce the overall supply available for other beneficial uses in the state.

Rather than leaving the matter of the public trust entirely up to the uncertainty of the courts, we suggest that administration of the public trust in California can best be carried out with state involvement. We believe the Legislature would be helpful in sorting out the following issues and options:

- How should water rights holders suffering reallocation of their water supplies be compensated?
- What is the proper forum for public trust balancing?
- What are the relevant issues that should properly be considered in a public trust balancing?

There is a need for consistent application of public trust decisions to restore confidence in our state's water rights system. Such consistency is important if we are to put the water resources in this state to maximum beneficial use and if we desire to promote sensible long-range planning and investment. It is also of major importance if we are to achieve significant benefits from the water marketing opportunities being encouraged by the Legislature.

LADWP POLICY STATEMENT ON MONO LAKE

1. Water diversions by the DWP from the Mono Lake Basin are an important source of high quality water for the City. Mono Basin water also produces a substantial amount of clean, non-fossil-fuel-based electricity for the City. The people of the City own established water rights under state law authorizing these diversions and have relied on these rights and the water those rights secure for many years.

2. The Department will consider any decrease in Mono Basin diversions in light of two important realities.

   a. The Department faces considerable uncertainty today with regard to every one of its basic sources of water: in the Mono Basin, in the Owens Valley, from the Colorado River, from the State Water Project, and from groundwater pumping in the San Fernando Valley. The reliability of supply from each of these sources is less than it has been in decades.

   b. Today, all water purveyors are under increasing pressure to serve the highest quality of water available. Mono Basin water is the highest quality water currently available to the Department. A loss of Mono Basin water would force the Department to serve more water of slightly lesser quality.

3. The Department believes that, based on available scientific evidence, the Mono Lake ecosystem is currently in a healthy and productive state, particularly in regard to the most critical issue of the Lake's ability to provide food and habitat for large numbers of migratory birds. The DWP will continue to participate cooperatively in research and monitoring programs designed to determine the lake levels necessary to maintain the Mono Lake ecosystem in a healthy state.

4. The Department must view the water needs of the residents of the City as its first priority. However, the Department recognizes that for many citizens of the City, State and Nation, the lake is a unique environmental resource of significant value. The Department acknowledges its responsibility to do what it reasonably can to maintain the lake in an environmentally healthy condition. The Department also recognizes that to do so will, at some point in time, require a reduction in the City's authorized diversions which must be replaced.

5. The Department believes it is incumbent on all concerned -- the City, the State, the Nation, the environmental community, and other relevant entities -- to work together to find means by which both the needs and requirements of both the City and the lake can be accommodated.

6. Specifically, the Department believes that the responsibility for providing high quality replacement water and energy supplies for the City must be shared by the State and Federal governments and other interested parties. The Department hopes that such a sense of shared responsibility will enable all concerned to reach a settlement that best serves the needs of people and the environment.

7. The Department will continue to vigorously pursue the practical implementation of water conservation and reclaimed water projects.

8. The Department pledges its best efforts to reach such a settlement. Until such a long-term settlement or solution is achieved, however, the Department must continue to represent the needs and rights of the people of the City.

THE MONO LAKE CONTROVERSY

INTRODUCTION

The City of Los Angeles' water gathering activities in the Mono Basin, currently the source of approximately one-sixth of the City's water supply, continues to be a focus of controversy. Several lawsuits have been filed against the City seeking permanent water releases in the Mono Basin to protect values associated with fish and other wildlife. These releases could reduce or eliminate the 100,000 acre-feet of water annually diverted by the City. The City is currently working with State and Federal governments and others to resolve these issues.

LOS ANGELES WATER SUPPLY

The Department has three basic sources of supply serving an average of 690,000 acre-feet of water per year to approximately 3.4 million people in Los Angeles.

- The Los Angeles Aqueduct supply, including Mono Basin diversions and Owens Valley supplies account for 70 percent of the total.
- Local groundwater basins in Los Angeles account for an additional 15 percent.
- The remaining 15 percent is purchased from the Metropolitan Water District of Southern California (MWD) which delivers water from both the State Water Project and the Colorado River Aqueduct. During dry years, when Los Angeles Aqueduct deliveries are below normal, the City relies on increased water purchases from MWD to help meet demands.

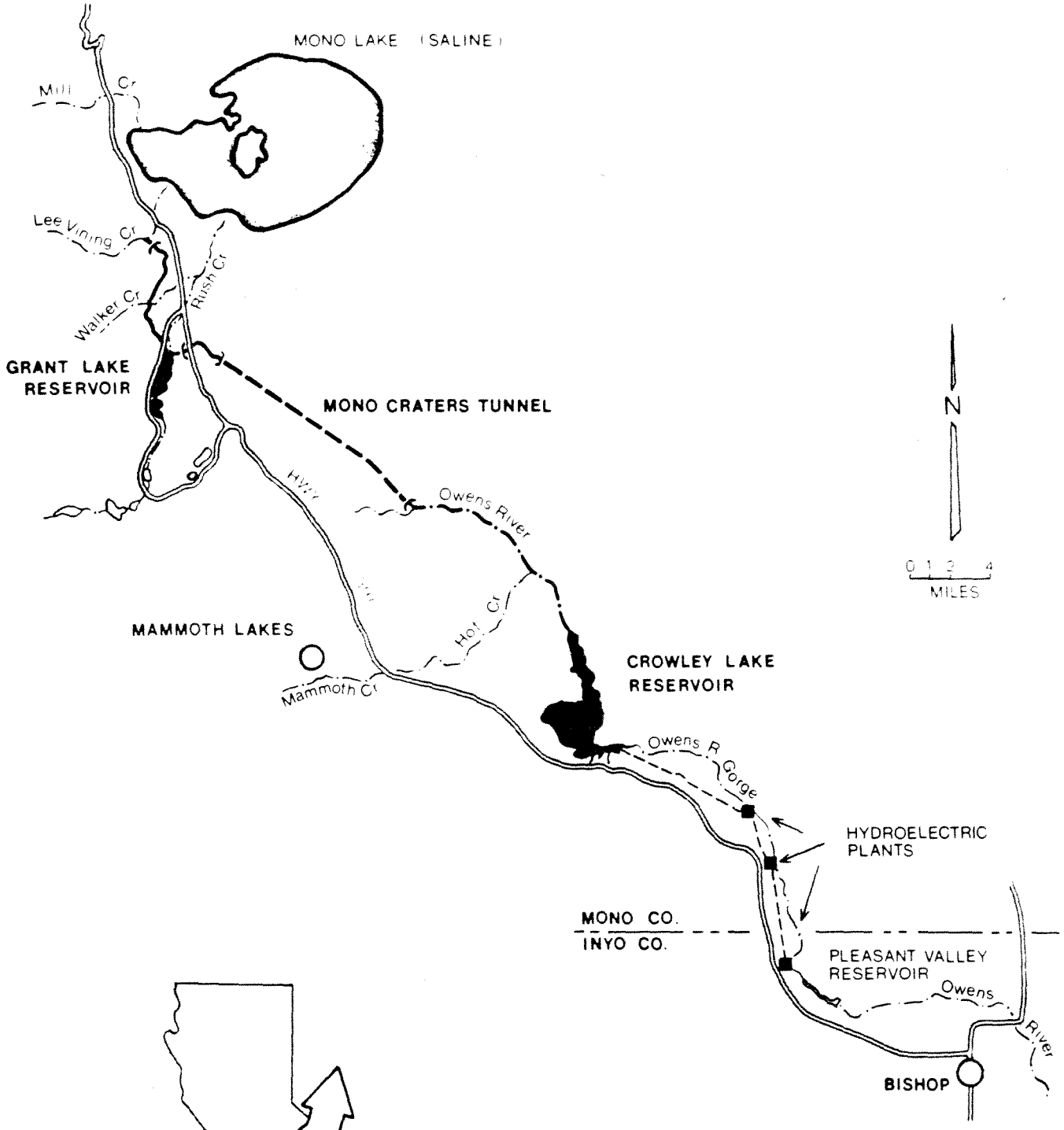
MONO BASIN PROJECT

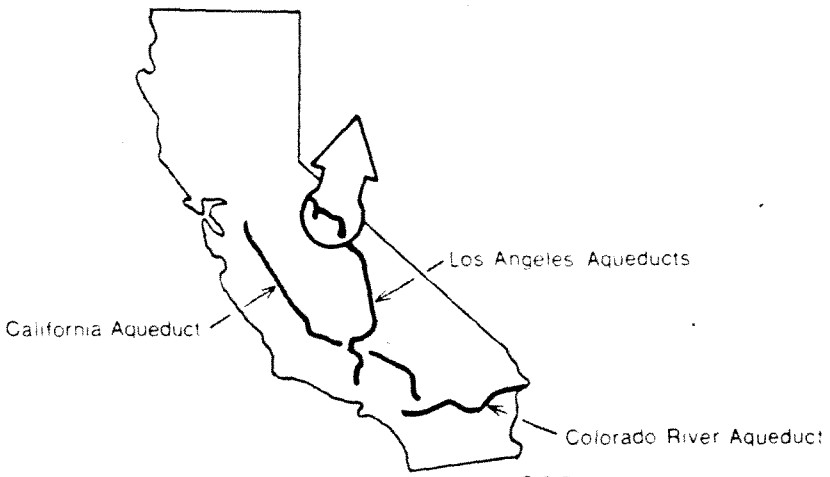
Not long after completion of the First Los Angeles Aqueduct in 1913, it became apparent that additional water supplies would be needed for Los Angeles. In 1923, Department of Water and Power officials filed for permits for water rights in the Mono Basin.

Construction of diversion facilities necessary to extend the aqueduct into the Mono Basin were completed in 1940 and permits were granted by the State Water Resources Control Board in that same year. Mono Basin facilities are shown on Figure 1.

The Mono Basin supply is of great importance to the people of Los Angeles. Mono Basin water, together with diversions from the Owens Valley, is the highest quality available to the

MONO BASIN EXTENSION OF LOS ANGELES AQUEDUCT





KEY MAP

Figure 1

1M 3/88

City. The needs of over 500,000 people are served by Mono Basin water, approximately one-sixth of the City's total water supply. The water also generates 300 million kilowatt hours of clean hydroelectric power as it flows to Los Angeles.

Over the last 40 years, the State and Federal governments have supported the City's water rights and associated water-gathering operations by granting permits and licenses, and enacting supporting legislation. The State Water Resources Control Board has always had the responsibility to consider the environmental consequences of all water rights permits and licenses granted.

The Mono Basin Project has contributed significantly to recreational opportunities in the Eastern Sierra and incorporated provisions required by the State Water Resources Control Board for the protection of the environment:

- As a condition to the water licenses granted in the Mono Basin, the Department agreed to provide land and help fund the construction of the Hot Creek Fish Hatchery, the largest and most productive fish hatchery in the Eastern Sierra.

- Hundreds of thousands of acres of land were withdrawn from potential development by the U.S. Congress to protect the watershed, resulting in the maintenance of open space for all types of outdoor recreation.

- Crowley Lake Reservoir, one of the state's premier trout fishing areas, and Grant Lake Reservoir, were constructed as part of the Mono Basin Project and now play host to hundreds of thousands of visitors each year.

MONO BASIN ECOLOGY

Mono Lake is a unique natural resource with a simple food chain that supports hundreds of thousands of nesting and migratory birds, but no fish. Mono Lake has been a salt lake, like the Great Salt Lake, for thousands of years. However, since 1941, Los Angeles water diversions have caused the lake's level to gradually decline and the lake's salinity to slowly increase.

The Mono Lake ecosystem has adapted to the changing lake levels. Scientific research on the Mono Basin ecosystem indicates that it is currently healthy and productive, and will remain that way for years to come; however, the Department recognizes that diversions may have to be reduced at some future data to maintain the lake in a healthy condition.

The City has committed approximately $3.5 million on environmental research in the Mono Basin. This research has and

will continue to provide a better understanding of the health of the ecosystem at differing lake levels.

MONO LAKE LITIGATION

The controversy over lowering Mono Lake levels and diversion of tributary streams has resulted in the filing of several lawsuits challenging the City's continued use of Mono Basin water.

The main lawsuit is the Mono Lake case (Audubon versus DWP), for which the State Supreme Court has decided that as a matter of public trust the needs of the people of Los Angeles must be balanced with the needs of the lake. Additional lawsuits have been filed regarding the maintenance of flows in the streams tributary to Mono Lake to maintain fisheries. Some of these cases also revolve around the concept of public trust.

These lawsuits have the following potential consequences to the people of Los Angeles:

- Loss of up to 100,000 acre-feet of water per year. This water is the highest quality water available to the City.
- Costs could exceed $30,000,000 per year to replace water and energy supplies.

LOS ANGELES WATER SUPPLIES FACE INCREASING UNCERTAINTY

The City will have a gradually increasing demand for water because of population and commercial/industrial growth, even though water conservation and reclamation are serving to slow the growth in demand. Water lost from the Mono Basin will add to the amount of new water that Los Angeles will need.

Even as the need for water in Los Angeles continues to grow, the City's sources of supply are becoming increasingly uncertain:

- Lawsuits challenging the City's Mono Basin supplies and unsettled groundwater pumping agreements in the Owens Valley raise serious questions about long-term water availability from the Los Angeles Aqueduct.
- Continued water quality problems in the San Fernando Groundwater Basin has limited the amount of water available for extraction.

The Department must look to MWD for water needed to replace any required reductions in City supplies as well as for additional water needed for future growth. However, MWD resources are also becoming less secure.

- MWD has already lost over half of its entitlement to Colorado River water to Arizona.

- MWD's dependable supply from the State Water Project is currently only 1.180 million acre-feet/year compared to a current contractual entitlement of 2.011 million acre-feet/year.

- The recent draft report from the State Water Resources Control Board staff on water quality in the San Francisco Bay and the Sacramento-San Joaquin Delta recommends that exports from the Delta be reduced to 1985 levels. Such a limit on Delta exports would raise serious questions as to MWD's ability to meet current and future water needs.

WATER CONSERVATION AND RECLAMATION

Los Angeles is vigorously pursuing all practical water conservation measures for the City and has one of the most comprehensive water conservation programs in the State. These efforts will help to extend the ability of the City's existing water resources to meet the water needs of the City's growing population.

This year, the Los Angeles City Council enacted an ordinance requiring all residential and business customers to install conservation devices in showers and toilets to reduce water use and sewer flows.

Other water conservation programs now in effect include a conservation-oriented pricing policy; low-flow shower head and conservation kit distribution; system maintenance measures; and a variety of residential, landscaping, business and industry, public information, and school education programs.

During this period of drought, the City has initiated Phase I of the Emergency Water Conservation Ordinance, which mandates a number of water use restrictions, and encourages a voluntary 10 percent water use reduction for all customers. Mandatory reductions in water use can be imposed as needed, depending on water supply conditions.

The City is also pursuing water reclamation where feasible. Although increased conservation and reclamation is slowing growth of demand, they will not overcome need for additional water supplies.

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Draining Mono Lake

L.A. has to find other water sources

They're putting a brave face on it, but Los Angeles Department of Water and Power officials suffered a serious setback this week when the U.S. Forest Service released its report on Mono Lake. Responsible for protecting this federally designated scenic area, the agency now adds its voice to the swelling chorus of those demanding that L.A. reduce its water imports to protect that region's faltering ecosystem. Yet city water planners seem determined to turn a deaf ear to this increasing clamor to save Mono Lake.

For the last 75 years, L.A. has been tapping the streams that carry the runoff from the melting Eastern Sierra snowpack to slake the thirst of Angelenos. In 1940, the Los Angeles Aqueduct ferrying that water south was extended 105 miles further north to the Mono Basin near the California-Nevada border, and it was then that the serious environmental damage really began.

Decades of diverting the streams that feed this briny lake have dropped its level by some 40 feet, with catastrophic effects on the wild bird populations. The increased salinity has depleted the brine shrimp and brine flies that serve as a primary food source for the birds; it's opened up land bridges to the former islands where they nest, allowing predators an easy stroll out to feed on the vulnerable young hatchlings. And as the dropping water level exposes more of the alkaline flats surrounding the lake, winds whip up a salty dust that further degrades the wildlife habitat and aggravates air quality problems in the area.

There's only one thing to do, as the Mono Lake Committee and other environmental groups, court rulings and now the Forest Service are insisting: Los Angeles must reduce its dependence on the Eastern Sierra streams feeding Mono Lake, which now constitute some 15 percent of the city's water supply.

That's going to take some doing. It may require cutting a deal with Central Valley farmers for part of their Northern California irrigation supplies; it may mean contracting with the Metropolitan Water District for more Colorado River water; it may dictate dramatic improvements in groundwater management and cleanup of the DWP's polluted San Fernando Valley wells so more can be used or reopened.

But most of all it means city officials must stop adding to Mono Lake's problems and start contributing to solutions.

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Help for Mono Lake

There should have been little surprise at the U.S. Forest Service's recommendation last week that the level of Mono Lake be maintained at the range of 6,390 to 6,377 feet above sea level. The lake now is at the lower limit, just above the point at which Negrit Island ceases being an island and is linked by a land bridge to the Mono Lake shore. This permits predators like coyotes to walk onto the island and prey on this important bird-nesting area.

The lake minimum that was proposed by the Forest Service is similar to recommendations of scientific groups and the Mono Lake Committee of water levels needed to maintain the lake as the scenic and scientific resource that won it federal protection in 1984 as a national Forest Service scenic area. The occasion of the announcement by the Forest Service was the release of a draft plan, requested by Congress, for the management of the 41,000-acre lake and surrounding region at the foot of the eastern Sierra near the town of Lee Vining in Mono County.

There is little dispute about the need and desire to maintain Mono Lake, but there is a hitch, of course. The reason the level of the lake has declined about 40 feet in the past 40 years or so is that the Los Angeles Department of Water and Power has been diverting Sierra stream water to Los Angeles to augment its municipal water supply. This is stream water that normally flows into the lake. The only feasible way of preventing further drops in the level of the lake is to cut back on the city's water diversions by about 70,000 acre-feet a year. This must be accomplished soon, or the continued depletion of the lake will cause significant harm to the unique ecosystem there.

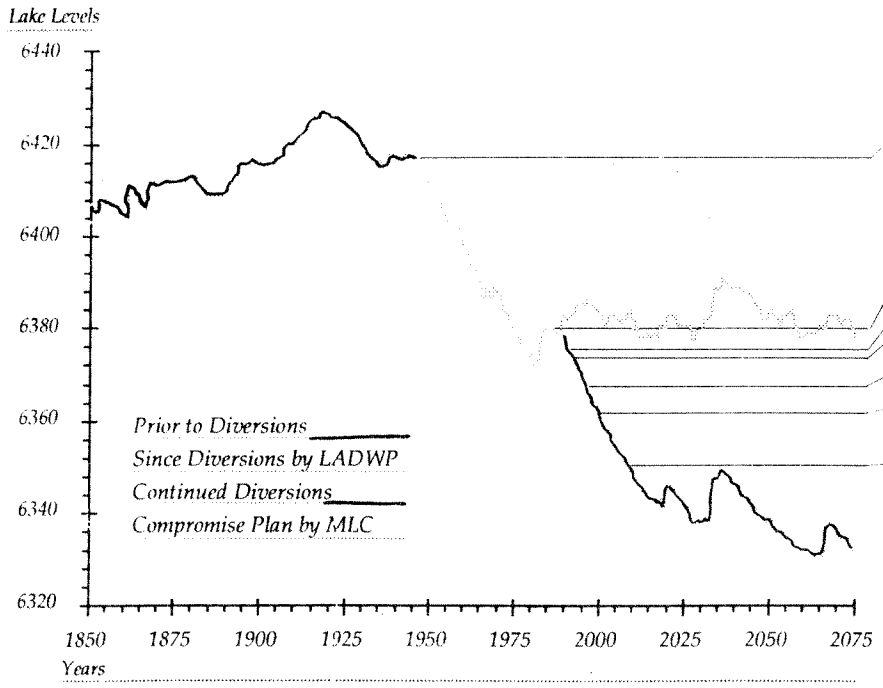
The handwriting has been on the wall before the Department of Water and Power for some time. Nearly everyone, including Mayor Tom Bradley, agrees that Mono Lake must be stabilized. The city has been on the losing end of lawsuits that seek to maintain the lake by restricting Los Angeles' water diversions. City officials have been involved in negotiations with the Mono Lake Committee, the Forest Service, the Environmental Defense Fund and others to find replacement water.

One source is conservation within the city itself. Los Angeles residents have demonstrated that they can save as much as 10% of historic supplies a year without hardship. That alone would be enough to offset the water that must be sacrificed in order to maintain Mono Lake.

The Forest Service cannot force Los Angeles to give up water, because the 1984 law creating the Mono Lake scenic area specifically protected existing water rights. But the federal government can be instrumental in the search for replacement water. One potential source is in another corner of the federal government.

The U.S. Bureau of Reclamation, which operates the Central Valley Project on the other side of the Sierra, is in the process of selling 1 million acre-feet of unobligated water to farmers for irrigation supplies and to other customers, including cities and towns. If the federal government believes that Mono Lake is a precious national natural resource that must be preserved, as is clear from the congressional mandate, why can't the federal government use some of its own unsold water to help save the lake? A simple order from the secretaries of agriculture and the interior might do the trick. One from the President surely would.

Mono Lake Water Level Timeline



6417' 1941 — DWP Diversions Begin

6380' 1987 — *Severe Dust Storms*
Dust storms from exposed lakebed violate State air quality standards 11% of the time; also violate federal emergency air quality standards for particulates. Air quality deteriorates significantly below this lake level.

6375' 1989 — *Ecosystem Decline*
Critical salinities reached for algae and brine flies triggering general ecosystem decline. Negit Island becomes landbridged causing loss of gull nesting habitat.

6372' 1991 — *Major Loss of Gull Nesting Habitat*
Current primary nesting islets, Twain and Java, become landbridged, causing major loss of gull nesting habitat. 60% of brine fly habitat lost.

6368' 1994 — *Irreversible Erosion / Loss of Wetlands*
Exposure of lake's topographic "nick-point," causing irreversible erosion and loss of wetlands below this level.

6363' 1999 — *Critical Salinty Levels*
High salinity levels critically impair brine shrimp reproduction.

6352' 2012 — *Ecosystem Collapse*
Destruction of lake's aquatic ecosystem.

Critical Lake Elevation Source: Botkin, Daniel et. al., 1988 "The Future of Mono Lake".
Water Level Graph Projections by Peter Vorster. Graphics by Stephen Johnson.

Thomas Graff*

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COMMENTS

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Environmental Quality, Water Marketing, and the Public Trust: Can They Coexist?

Thomas J. Graff *

Nearly my entire professional lifetime has been spent in behalf of environmental protection in the West, most of it in the field of water resources. During that time I have become increasingly committed to integrating economic analysis with environmental preservation values. I believe that my employer, the Environmental Defense Fund (EDF), has also become committed to that philosophy. We have long advocated least-cost investment planning for major private and public electric, gas and water utilities. We have experimented with attempts to qualify what most have thought to be unquantifiable environmental and recreational assets such as trout streams and high-quality river rafting. We have sought to introduce economic criteria into a range of pollution control regulatory and investment contexts, most recently in connection with the growing problem of drainage from irrigated agriculture in the West. And for many years we have championed and promoted relaxed marketing of water rights in the West as an alternative to the government subsidy-and-regulation policies which have been the dominant method of allocating scarce water in all the Western states.

The question then arises: if we are so committed to an economic way of thinking, what are we doing promoting the greater application of the public trust doctrine in the water rights field? The public trust doctrine is a lawyer's and judge's dream. But at least at first glance it seems to leave little room for the balancing of economic costs and benefits. And certainly it seems to elevate public property rights to a status well above those of private property, a result that inevitably will lead to more bureaucratic inefficiency and less market-based efficient allocation of private property interests in water.

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* Thomas J. Graff, Senior Attorney, Environmental Defense Fund. Adapted from a presentation given at a symposium on "Western Resources in Transition: the Public Trust Doctrine and Property Rights," sponsored by the Political Economy Research Center at Bozeman, Montana May 17, 1986.

I think there are several answers to the question of why we have promoted the implementation of the public trust doctrine, in at least some situations, which should be acceptable to all but the most extreme devotees of libertarian thought. They hinge primarily on the concept of market failure. They include situations where interests in public resources are shared so broadly among so many people, without any reasonable method for restricting access to those resources, that the only way to protect those resources is by public intervention, and situations where economic activity causes negative environmental externalities to publicly held goods or values.

To take the most salient example, there appears to be no effective way to tax every bird watcher or duck hunter who takes pleasure from the birds nesting or feeding at Mono Lake. Nor is it likely to be feasible to assess every passer-by on Route 395 who enjoys the view of the Mono Lake Basin. Yet these disparate interests are committed to having the greater society take their values into account in determining the future of Mono Lake. Judicial implementation of the public trust doctrine is one means to force society to come to terms with the conflict in values over what should be Mono Lake's future. Many who have criticized the California Supreme Court's decision in the Mono Lake case, I believe, have insufficiently recognized that it was not the Court which created the clash over Mono Lake's future, but rather the contending litigants.

Having said this much, let me say now that I do not believe that the courts, via the public trust doctrine or any other legal artifice, will decide Mono Lake's future. The public support for Mono Lake's preservation is so pervasive that I am convinced it will cause the Governor and Legislature of California to fashion a compromise between environmental interests and the City of Los Angeles. Such a compromise will limit the City's diversions from the basin and will include some financial contribution, direct or indirect, by the state (and perhaps the federal government) that will partially compensate the City for its loss of water and power. A political problem with environmental and economic components will be solved in the political area. Contrary to de Tocqueville's maxim that all major American political questions eventually become judicial questions, I believe the various Mono Lake legal controversies will recede when a political compromise is hammered out. The myriad lawsuits are basically tactical devices to win advantage in the political negotiation yet to come.

The second major water controversy in California where the public trust doctrine is lurking barely below the surface of public con-

sciousness and contentiousness involves the level of freshwater inflow to San Francisco Bay. In 1978, a California regulatory board, the State Water Resources Control Board, issued a water rights and water quality decision dividing the waters of the Sacramento and San Joaquin River systems between Sacramento and San Joaquin Delta interests. One interest group included agricultural, municipal, industrial and fishing interests, and the other group included the two major water projects which divert water from the San Francisco Bay/Delta Estuary, the Federal Central Valley Project and the State Water Project. Approximately a dozen challenges to that decision were taken to the courts of California and are now pending before a California Court of Appeal in San Francisco.

One of these challenges raises the failure of the State Board to employ the public trust doctrine to protect the environmental values of the entire San Francisco Bay/Delta Estuary. This challenge appears in an amicus brief EDF filed in association with several other environmental and fishing groups. I am hopeful (what kind of a lawyer would I be if I were not?) that the Court of Appeal will soon issue an opinion invoking the public trust doctrine to protect the Bay and Delta that will give direction to the Board as it again begins the process of hearing evidence which will lead to a decision in 1989 or 1990 updating its 1978 decision.

It may be instructive, moreover, to describe what kind of directions we are asking the courts to give to the Board as it allocates the water of the Sacramento/San Joaquin and Bay/Delta/Estuary systems. We are asking for more economic investigation, not less. We are calling on the Board to consider whether the diverters' uses of water from the Estuary are economic. What about all those government subsidies which encourage too many diversions? We will be asking the Board to consider what would be the extent of the need for diversions if the major diverters encouraged, rather than obstructed, the free trading of water in the state. And we will be asking what would the real need for diversions be if water were priced at what it is really worth or at least at what it actually costs to store and deliver.

Admittedly an imperfect, cumbersome, and not very expert State Board will hear the evidence and allocate the waters of the estuary. The Board, much like the California Public Utilities Commission in the mid-1970s when we first brought economic criteria to the electric utility investment business, has only recently hired its first staff member who has an economic background and is not even employing him as an economist. But the locus for deciding the Bay's fu-

ture is at least formally in the Board. And we at EDF, in invoking the public trust doctrine, are merely asking that widely shared public values in San Francisco Bay water quality and ecological integrity be weighed in the balance where previously they have been ignored entirely or given extremely short shrift.

What then do these two examples (Mono Lake and San Francisco Bay) of highly visible, and yet very complex and contentious, controversies teach us? I suppose that we are doomed to live in a era of mixed systems. Private and public property rights. Public trust doctrine and free marketing of water rights. Economists and lawyers.

Having said that in a room probably filled with committed libertarians, let me hasten to add that I agree with those who are critical of the public trust doctrine because its broad application raises some serious problems. I will now detail a few of those problems and make a few suggestions as to how the use and scope of the doctrine should be deployed to reduce those problems to a minimum. I have already alluded to the first problem. Judicial implementation of a public trust doctrine to protect environmental resources diminishes the certainty with which private property interests in water are held. If appropriators of water from a stream are forever subject to the open-ended possibility that a court or a regulatory authority may seek to take back that appropriated water to protect the in-stream value which that diversion may be threatening, the appropriative right, which may long have been thought by its holder to be a vested right, may turn out instead to be an illusory right. Moreover, the uncertainty which is engendered by the possibility that the public trust doctrine will be invoked may well make the transfer of that appropriative right less likely and it certainly will make the right less valuable. A potential buyer seeking a new water supply may well be deterred from paying the transaction costs of negotiating a water purchase if his prospective supply is subject to a higher and non-compensating use, thus possibly precluding a more efficient use for that water.

A second problem arises because it is unlikely that the courts will see fit to limit application of the public trust doctrine only to those resources which truly are "public" in nature and to which access cannot reasonably be restricted. It is my understanding that the Montana legislature has recently sought to make a distinction between categories of streams where public access and public management are prescribed and others where private control will continue to be the norm. Whether such a distinction can be made success-

fully, time may tell. It certainly will be difficult to fashion criteria that satisfactorily distinguish cases where public intervention is justified from those where it is not.

Finally, a third problem also already alluded to is the perceived arbitrariness of bureaucratic allocation of resources. So-called "public choice" theorists and others have convincingly made the case that bureaucrats (and most probably judges) frequently, if not invariably, act in ways which maximize their own interests rather than those of the public they are theoretically serving. Moreover, in many cases, even where the motivation of bureaucratic or judicial decision-makers is not suspect, their capacity to make sensible allocation decisions among competing resource claimants is likely to be biased by political philosophy, environmental attitude, and information limitations. When eco-minded decision-makers are in power, which tends to be rather rare, the pendulum will swing one way. When the boomers take over, the pendulum swings the other way.

These are all serious problems. None is easily solved. But in trying to bring this presentation to a close, let me suggest if not a resolution of these problems at least the beginning of an approach to their amelioration. In essence, what I will recommend is an effort to integrate the economist's interest in efficiency with the environmental lawyer's advocacy of judicial and bureaucratic preservationist doctrine.

First, we should all recognize that the principal reason the public trust doctrine is being employed and discussed ever more frequently in judicial and academic circles is that generally the value society is placing on environmental and recreational amenities seems to be steadily increasing. People may debate whether this is primarily a function of higher incomes, increasing population density, or diminishing environmental quality, but the phenomenon is difficult to dispute. Fifty years ago no one thought twice about the value of a wetland or a tidal marsh if economic development was proposed on such a site. Today, as they have become increasingly scarce, society values such environments much more highly. Accordingly, at least in a rough sort of way there is frequently an implicit economic valuation taking place when the public trust doctrine is invoked to protect a particular environmental resource.

Second, as societal experience with the public trust doctrine concept increases, economic criteria are likely to play an increasing role in the real-world decisions which flow from application of the doctrine. The Mono Lake case has been remanded to lower courts and may be referred to the State Board for fact-finding which will bal-

ance the interests of the lake and its supporters against those of the City of Los Angeles. In the San Francisco Bay situation, as I noted earlier, EDF has already announced its intention to urge the Board to consider economic evidence and arguments in allocating the waters of the Bay/Delta estuary. The public trust doctrine, at least as it applies to water rights allocation, is still in its infancy, yet it is clear that its implementation will involve the application of economic criteria.

That still leaves the question, however, whether a market in water can be integrated with the application of the public trust doctrine. Bureaucratic or judicial implementation of economic criteria does not a market make. Here I think progress is still in a fledgling state. Earlier in this presentation I predicted the ultimate resolution of the Mono Lake controversy and labelled that resolution political. But that resolution, if it takes place, can also be termed an economic and almost a market solution. Representatives of the public that appreciates Mono Lake, i.e., the state and perhaps the federal government, will pay Los Angeles at least partial compensation for foregoing a significant percentage of its potential diversions from the Mono Lake Basin. In the San Francisco Bay situation, such a political/economic solution is both harder to fashion and to predict, but the seeds of such an approach have already been sown. A bill now wending its way through Congress reallocates the costs of the Central Valley Project so that if more Project water is ultimately dedicated to Bay/Delta protection, less reimbursement of the Project's financial cost will be required of its water contractors. Similarly, at the state level, discussion has begun concerning a similar reallocation of cost to the state taxpaying public as a proxy for the public interest in the Bay should more water be dedicated to Bay outflow.

I do not mean to suggest that the above approaches to resolve the Mono Lake and San Francisco Bay controversies are perfect. Far from it. Indeed, a lengthy and bitter debate is anticipated concerning the question of what segment of the public benefits from invocation of the public trust and what segment of the public should compensate the property rights holders whose interests are infringed by application of the trust (if compensation is to be paid at all). Not all California taxpayers are bird-lovers. Nor is it clear that a resident of New Jersey or even of San Diego has such a compelling interest in the ecological health of San Francisco Bay. Our democratic political process, with its inevitable trade-offs, is at best an imperfect method for discerning the preferences of the body poli-

tic. But for the major public resource questions we face it is the best we have.

I conclude with an exhortation. Let's just make sure that as political decisions are made to allocate our resources, both the public's interest in environmental preservation and its interest in economic efficiency are considered. In many situations, if not in most, the two should be reconcilable, particularly if the environmental concerns are given the imputed economic value which they deserve.

BALANCING CALIFORNIA'S DIVERSE WATER NEEDS

a statement before the
Assembly Committee on Water, Parks and Wildlife
by
William J (B.J.) Miller
Consulting Engineer
November 21, 1988

You have certainly chosen a challenging topic for us. This "balancing," the essence of the State Water Resources Control Board Bay-Delta proceedings, has two annoying characteristics: It is highly controversial, and it is conceptually difficult. Other than that, it's a piece of cake.

Undaunted by the formidable nature of this issue, I will set forth the principles on which I believe this balancing should be based.

First, it must start with the facts, not with the popular but erroneous opinions so common in California. Let's look at some of the key "facts":

"Fact" 1: California agriculture uses 85% of the water in California.

That depends on how you look at it. If you consider all uses, you get a markedly different picture.

California agriculture uses about 40% of the water. Urban uses amount to about 8%. About 50% has been dedicated to fish and environmental uses.

The North Coast Wild and Scenic Rivers have an average annual runoff of about 29 million acre-feet per year. Delta outflow requirements for fish account for another 5. This 34 million acre-feet is dedicated to environmental uses. This is more than the total water use by urban and agriculture combined.

I am not advocating that we abandon the Wild and Scenic River protections or that we lower the Delta outflow requirements. Let us keep in mind, though, that this is not Arizona; this is a state that has already dedicated 50% of its water to environmental uses.

"Fact" 2: San Francisco Bay is dying because of flood control/water development projects..

Tom Graff writes the weekly editorial for the San Francisco Chronicle on this one. However, even the State Water Resources Control Board staff did not buy it. This old myth has a foundation less stable than Mt. St. Schuster*. It rests on two notions, one, that freshwater flows into the Bay have decreased by 60% when, in fact, they have increased over the last 65 years. (Incidentally, we now have a paper accepted for publication in a highly reputable, refereed journal that documents this increase.)

*Recalling Assemblyman Costa's reference to the snow at Lake Tahoe actually not being snow, but fallout from the eruption of Mt. St. (Dave) Schuster when Schuster saw the draft Bay-Delta Plan.

The other notion is that striped bass is the indicator species for the Bay-Delta system. This is nonsense. The problems with the striped bass, though mysterious, are centered in the Delta and Suisun Bay. No experts are saying the problems lie elsewhere, certainly not throughout San Francisco Bay. It is also becoming increasingly clear that the demise of the striped bass since the 1976-77 drought has not been the result of water project operations. Some other factor has entered the picture, possibly the introduction of new species into the Delta.

"Fact" 3: Salmon populations have been decimated by flood control/water development projects, and the way to fix the problem is to dramatically curtail operation of these projects.

This one is tricky. First, salmon populations are stable and have been for decades. While the number of salmon spawning in river gravels has suffered substantial declines, hatchery production has offset this decline. (Incidentally, about 70% of hatchery reared salmon that return do not return to the hatchery; they "stray.")

Second, recent information indicates that the temperature of water flowing down the Sacramento River is more important than the amount of water in the survival of young salmon migrating out through the Delta. This kind of information may lead to some management options that would be good for salmon and not disastrous for flood control/water development projects.

Finally, there is the fact that much could be done upstream to improve conditions for salmon other than radically curtailing operation of water projects.

Keep this is mind--Increasing the number of adult salmon that spawn in river gravels while maintaining the production of hatcheries is going to result in even more salmon than we have had for decades. We are not talking here about rehabilitating an adult population that is in a state of decline. We are talking about the laudable goal of increasing the number of salmon spawning in river gravels.

"Fact" 4: California agriculture is nothing but big corporate farmers buying cheap, subsidized water growing price-supported crops and producing toxic agricultural drainage. Therefore, the way to balance California's water needs is to take the water from agriculture (they don't deserve it anyhow) and give it to cities (a la Owens Valley) and to fish.

I think water transfers from agricultural to urban users is a good idea. It's happening. But it is not the key to balancing California's water needs.

First, the above characterization of California agriculture, a political and public-relations pre-condition of taking its water, is grossly misleading. Agriculture is just beginning to react to this ploy. I can promise that you will be hearing more on this subject from agriculture in the near future.

Second, we have already dedicated a lot of water to environmental uses. (Try going to Arizona and arguing for more water from the Colorado when you have already dedicated 50% of your water for environmental needs.)

Third, these water transfers, if accomplished by means other than governmental fiat, are proving to be difficult deals to cut.

Fourth, such transfers have the potential of serious social consequences. I don't hear anyone talking yet about the social effects on scores of Central Valley communities of taking water from surrounding agricultural lands.

So, my first principle for balancing would be to start on a firm factual basis, not on popular rhetoric or old, emotion-laden positions.

Balancing does not start with policy, not in a system as constrained as this one. It starts with facts; it starts with a critical examination of those facts and of the possibilities for solving problems.

My second principle would be to look at **all** the options. Do not, as the State Water Board staff has done, arbitrarily rule out a host of options. Look at options that involve intense management of all the uses, not just urban and agricultural uses. Look at options that involve maximum protection of public health. Look at facilities.

My third principle would be that balance requires cooperation. It is pretty clear that this will not be a win-lose deal. So, I would presume that success depends on cooperation, and I would take steps to encourage, if not require, that such cooperation take place.

One final thought on the matter of legislation--It is clear to me that the fundamental planning mistake made by the State Water Resources Control Board staff in its draft Bay-Delta plan is that they were arbitrary. They have eliminated from consideration a number of important policy bases for the plan. Four come quickly to mind: a policy requiring that comprehensive management be applied to all uses, a policy providing for maximum protection of public health, a policy requiring that costs be minimized, and a policy providing for economic development. Whether you agree with those policies or not, it would be hard to argue that they should have been summarily dismissed. Yet, they were.

Of course, there is no guarantee that had such things been considered, they would have been recommended. Nevertheless, it seems appropriate that consideration be the minimum required.

Therefore, I think legislation would be appropriate that, at a minimum, sets forth in more detail just what the Board should consider in making such far-reaching decisions. If you also want to provide quidance on how they should decide, I would think that would be appropriate also, but I have serious doubts about the possibility of reaching agreement on that point.

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Sacramento, California
November 15, 1988

Honorable Jim Costa
2111 State Capitol

Public Trust Doctrine - #22732

Dear Mr. Costa:

QUESTION NO. 1

Is the public trust doctrine, as judicially construed to apply to appropriated waters, subject to statutory change or elimination?

OPINION NO. 1

The public trust doctrine, as judicially construed to apply to appropriated waters, is not subject to statutory change or elimination. However, the public trust doctrine does not preclude the Legislature from enacting legislation for purposes of administration of the public trust and the allocation of the state's water resources.

ANALYSIS NO. 1

In the landmark decision of National Audubon Society v. Superior Court (33 Cal. 3d 419; hereafter Audubon), decided in 1983, the California Supreme Court held that the public trust, which applies to navigable waters and the lands underlying those waters, imposes on the state a duty of continuing supervision over the taking and use of appropriated water. The court discussed the issues involved in Audubon, which concerned the diversion of water from streams flowing into Mono Lake by the Department of Water and Power of the City of Los Angeles (DWP), as follows (Audubon, supra, pp. 425-426):

"This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. . . . They meet in a unique and dramatic setting which highlights the clash of values. Mono Lake is a scenic and ecological treasure of national significance, imperiled by continued diversions of water; yet, the need of Los Angeles for water is apparent, its reliance on rights granted by the board evident, the cost of curtailing diversions substantial.

"Attempting to integrate the teachings and values of both the public trust and the appropriative water rights system, we have arrived at certain conclusions which we briefly summarize here. In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. The corollary rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except to serve trust purposes cannot, however, apply without modification to flowing waters. The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream. The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses. Approval of such diversion without considering public trust values, however, may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests."

The relationship between the public trust doctrine and the appropriative water rights system was summarized in Audubon, as follows (Audubon, supra, pp. 445-446):

> "a. The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust. [Footnote omitted.]
>
> "b. As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream. . . .
>
> "c. The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. [Footnote omitted.] Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. . . ."

It is well established that the state, as administrator of the trust in navigable waters on behalf of the public, does not have the power to abdicate its role as trustee (City of Berkeley v. Superior Court, 26 Cal. 3d 515, 521; see also Sec. 4, Art. X, Cal. Const.). In Audubon, the court held that the state's duties as trustee of the trust include an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible (Audubon, supra, p. 446). Thus, as a general proposition, the public trust doctrine, as construed by the court in Audubon, is not subject to statutory change or elimination, in that the state may not abdicate its duties as trustee of the trust or free trust property from trust restrictions (Audubon, supra, p. 440).

This does not mean, however, that the state, in its role as trustee of the public trust, may not enact legislation for purposes of administration of the trust. The administration of the public trust by the state is committed to the Legislature, and a determination of that branch of government made within the scope of its powers is conclusive in the absence of clear evidence that its effect will be to impair the power of succeeding legislatures to administer the trust in a manner consistent with its broad purposes (see City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, fn. 17; Mallon v. City of Long Beach, 44 Cal. 2d 199, 207).

The court in Audubon, moreover, expressly recognized the power of the state, as administrator of the public trust, to prefer one trust use over another (Audubon, supra, p. 439, fn. 21). The court also expressly recognized the power of the Legislature, as a matter of current and historical necessity, to permit an appropriation of water from flowing streams for use outside the watershed even though the appropriation does not promote, and may unavoidably harm, public trust uses at the source stream (Audubon, supra, p. 446). Thus, while the duties imposed on the Legislature in its role as trustee of the public trust require the Legislature to take the public trust into account in the planning and allocation of water resources, the public trust doctrine does not preclude the enactment of legislation for administration of the public trust and the allocation of the water resources of the state between trust and nontrust uses.

In summary, therefore, the public trust doctrine, as judicially construed to apply to appropriated waters, is not subject to statutory change or elimination. However, the public trust doctrine does not preclude the Legislature from enacting legislation for purposes of administration of the public trust and the allocation of the state's water resources.

QUESTION NO. 2

Does the public trust doctrine require a preference for public trust uses over existing water use priorities set by statute and the California Constitution?

OPINION NO. 2

The public trust doctrine does not require a preference for public trust uses over existing water use priorities set by statute and the California Constitution.

ANALYSIS NO. 2

The court observed in Audubon that the objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways (Audubon, supra, p. 434). Public trust uses were traditionally defined in terms of navigation, commerce, and fisheries, and have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation proposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes (Audubon, supra, p. 434). Trust uses, however, are sufficiently flexible to encompass changing public needs, and now include the preservation of trust lands in their natural state for ecological and scenic purposes (see Marks v. Whitney, 6 Cal. 3d 251, 259-260). The court recognized that the principal trust uses sought to be protected in Audubon "are recreational and ecological--the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds" (Audubon, supra, p. 435).

The appropriative water rights system which is administered by the State Water Resources Control Board (hereafter the board) developed independently of the public trust doctrine (Audubon, supra, p. 445). The court noted in Audubon that the duties of the board in the administration of the appropriative water rights system have evolved from an essentially ministerial function restricted to determining if unappropriated water was available, to a quasi-judicial function involving a determination of the public interest and responsibility for comprehensive planning and allocation of waters (Audubon, supra, pp. 443-444).

In regard to water use priorities, it is declared by statute to be the established policy of the state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation (Sec. 106, Wat. C.; see Sec. 1254, Wat. C.). However, as indicated above, the court pointed out in Audubon that both statutory enactments and judicial decisions have expanded the powers and duties of the board to protect recreational, ecological, and other in-stream uses of water subject to appropriation (Audubon, supra, p. 444). Thus, the court concluded that the present board is required by statute to take into account interests protected by the public trust in undertaking planning and allocation of water resources and is authorized to protect public trust uses by withholding water from appropriation (Audubon, supra, p. 444).

The court discussed the relationship of the statutory water use priorities as follows (Audubon, supra, pp. 447-448, fn. 30):

> "In approving the DWP appropriative claim, the 1940 Water Board relied on Water Code section 106 which states that '[i]t is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.' DWP points to this section, and to a 1945 enactment which declares a policy of protecting municipal water rights (Wat. Code, Sec. 106.5), and inquires into the role of these policy declarations in any reconsideration of DWP's rights in the Mono Lake tributaries.
>
> "Although the primary function of these provisions, particularly section 106, is to establish priorities between competing appropriators, these enactments also declare principles of California water policy applicable to any allocation of water resources. In the latter context, however, these policy declarations must be read in conjunction with later enactments requiring consideration of in-stream uses (Wat. Code, Secs. 1243, 1257, quoted ante at pp. 443-444) and judicial decisions explaining the policy embodied in the public trust doctrine. Thus, neither domestic and municipal uses nor in-stream uses can claim an absolute priority."

Thus, water use priorities established by statute must be read in conjunction with statutory provisions requiring consideration of in-stream uses involving the values embodied in the public trust doctrine, and neither consumptive nor in-stream uses can claim an absolute priority.

Water use priorities are also established in Section 2 of Article X of the California Constitution, which limits the right to water to such water as is reasonably required for the beneficial use to be served, and prohibits the waste or unreasonable use of water pursuant to any water right. This constitutional amendment not only affected priorities between water rights users, but "established the doctrine of reasonable use as an overriding feature of California water law" (Audubon, supra, p. 442). The Audubon court noted that all uses of water, including public trust uses, must now conform to the standard of reasonable use required by the California Constitution (Audubon, supra, p. 443).

There is nothing in Audubon, moreover, which mandates that public trust uses be given priority over water use priorities established by statute. As we have seen, Audubon specifies only

that "the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible" (Audubon, supra, p. 446). The court recognized that the state may approve appropriations despite foreseeable harm to public trust uses. The duty of the state as trustee is to consider the effect of the taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust (Audubon, supra, pp. 446-447).

The court in Audubon held, however, that once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water, and the state may reconsider allocation decisions whether or not the original decision considered the effect of the decision on the public trust (Audubon, supra, p. 447). Thus, vested appropriative water rights, whether or not the board has reserved jurisdiction to amend, revise, or supplement terms and conditions in any water rights permit issued by the board (see Sec. 1394, Wat. C.), may be reconsidered for their effect on public trust uses, in the same manner as the board, in approving new applications to appropriate water, may weigh and protect public trust interests. As in an original proceeding for a permit to appropriate water under existing statutory procedures, neither consumptive nor in-stream public trust uses are entitled to an absolute priority, but the board in making any allocation or reallocation decision must take into account the impact of the water diversion on public trust uses.

In our opinion, therefore, the public trust doctrine does not require a preference for public trust uses over existing water use priorities set by statute and the California Constitution.

QUESTION NO. 3

Does the public trust doctrine apply to releases of stored water?

OPINION NO. 3

The public trust doctrine applies to releases of stored water to the extent they affect navigable waters.

ANALYSIS NO. 3

The court concluded in Audubon that the public trust doctrine protects navigable waters from harm caused by diversion of nonnavigable tributaries (Audubon, supra, p. 437). Releases of stored water may have a direct impact on downstream navigable waters, and, in acting upon applications to appropriate water, the board may impose terms and conditions for the protection of in-stream public trust uses (see United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 150-151; Fullerton v. State Water Resources Control Bd., 90 Cal. App. 3d 590, 603-604; California Trout, Inc. v. State Water Resources Control Bd., 90 Cal. App. 3d 816, 821). Recently, in Golden Feather Community Assn. v. Thermalito Irrigation Dist., 199 Cal. App. 3d, 402, 409, the court concluded that the public trust doctrine does not extend to nonnavigable streams to the extent they do not affect navigable waters, since navigability is the measure of the public trust doctrine. To the extent, however, that releases of stored water affect public trust uses of navigable waters, they would be subject to the state's powers of continuing supervision over the taking and use of appropriated water derived under the public trust doctrine (see United States v. State Water Resources Control Bd., supra, p. 150).

In our opinion, therefore, the public trust doctrine applies to releases of stored water to the extent they affect navigable waters.

QUESTION NO. 4

Is the public trust doctrine necessarily limited to the preservation of natural water flows?

OPINION NO. 4

The public trust doctrine is not necessarily limited to the preservation of natural water flows.

ANALYSIS NO. 4

In Marks v. Whitney, supra, at pages 259-260, the California Supreme Court held that the preservation of trust lands in their natural state for ecological or environmental purposes is a use encompassed within the public trust. Trust purposes, however, have traditionally been broadly delineated in terms of navigation, commerce, and fisheries, and the implied powers of the state as trustee include everything necessary to the proper administration of the trust in view of its purposes (City of Long Beach v. Mansell, supra, p. 482). Thus, the purposes of the trust are not limited to the preservation of natural conditions, and the

state may undertake to improve trust lands in furtherance of trust purposes, such as navigation and commerce (City of Berkeley v. Superior Court, supra, pp. 523-525).

The court noted in Audubon that the principal public trust interests in Mono Lake are recreational and ecological, although the lake probably qualified as a "fishery" under the traditional public trust cases (Audubon, supra, p. 435). As a general matter, the public trust interests which will be affected by water resources allocation decisions made by the board in the administration of appropriative water rights are in-stream trust uses, including fisheries, recreational, ecological, and environmental uses.

There is nothing in Audubon, however, which limits the state's powers as trustee of the public trust to the preservation or restoration of natural water flows. The state is broadly directed to take the public trust into account in the planning and allocation of water resources and to preserve, so far as consistent with the public interest, the uses protected by the public trust (Audubon, supra, pp. 446-447). It is apparent, for example, that requirements for enhanced stream flows during a specified period may promote trust interests and mitigate unavoidable harm to trust uses caused by water diversions. Thus, in reconsidering past water resource allocation decisions under the public trust doctrine, we think the state may consider all relevant public trust interests and is not limited solely to preservation of natural water flows in protecting trust interests.

In our opinion, therefore, the public trust doctrine is not necessarily limited to the preservation of natural water flows.

QUESTION NO. 5

May the public trust doctrine be applied to require retention of minimal pools in reservoirs not otherwise subject to such a requirement?

OPINION NO. 5

The public trust doctrine may not be applied to require retention of minimal pools in reservoirs not otherwise subject to such a requirement.

ANALYSIS NO. 5

In Golden Feather Community Assn. v. Thermalito Irrigation Dist., supra, the court considered whether the public trust doctrine could be applied to prevent a reduction in the

level of an irrigation reservoir which impairs the use of the reservoir for fishing and recreational purposes and other trust uses. The court held that the public trust doctrine does not extend to nonnavigable waterways in the absence of some impact on navigable waters and further observed (Golden Feather Community Assn. v. Thermalito Irrigation Dist., supra, pp. 409-410) as follows:

> "While we are constrained to hold that the public trust doctrine does not extend to nonnavigable waterways in the absence of some impact on navigable waters, there is another reason why plaintiffs cannot state a cause of action under the public trust doctrine in this case. We are concerned here with an artificial, man-made body of water. It is a reservoir created by the defendants' authorized diversion of water for specific purposes. As we have noted, the very essence of the public trust doctrine is that the State of California acquired title as trustee to all of its navigable waterways and the lands lying beneath them upon its admission to the union and cannot divest itself of the trust obligation. (National Audubon Society v. Superior Court, supra, 33 Cal. 3d at p. 434.) The state has broad authority to regulate the diversion of water from natural watercourses (id., at p. 441-444; see Cal. Const., art. X, Section 2), but there is no logical theory upon which we could hold that a public trust attaches to artificial waterways or reservoirs created to utilize an appropriative water right. In other words, the public trust doctrine empowers the state to forbid or limit diversions of water in order to protect the public trust in navigable waters. It does not, however, give the state the power to insist upon the diversion and yet at the same time empower it to preclude the usage of the appropriated waters in order to protect a previously nonexistent public right in artificial waterways. The plaintiffs here are not asserting that the public trust doctrine must be applied to protect a natural waterway; they are instead claiming a right to insist that an artificial body of water be maintained for their benefit. Such a claim is not cognizable under the public trust theory [footnote omitted]."

Thus, although the court noted that the state has ample constitutional and statutory power to control diversions from natural waterways and may impose conditions, including conditions assuring the interests asserted by plaintiffs, upon diversion, the court concluded that the public trust doctrine did not apply to protect uses of an artificial, man-made body of water (Golden Feather Community Assn. v. Thermalito Irrigation Dist., supra).

In our opinion, therefore, the public trust doctrine may not be applied to require retention of minimal pools in reservoirs not otherwise subject to such a requirement.

QUESTION NO. 6

May the Legislature enact mandatory procedures under which public trust claims to appropriated waters could be asserted and determined?

OPINION NO. 6

The Legislature may enact mandatory procedures under which public trust claims to appropriated waters could be asserted and determined.

ANALYSIS NO. 6

The administration of the public trust by the state is committed to the Legislature, and a determination of that branch of government made within the scope of its powers is conclusive in the absence of clear evidence that its effect will be to impair the power of succeeding legislatures to administer the trust in a manner consistent with its broad purposes (City of Long Beach v. Mansell, supra, p. 482; Mallon v. City of Long Beach, supra, p. 207). The establishment of procedures for asserting and determining public trust claims to appropriated waters would not in any manner constitute an abdication of the Legislature's trust responsibilities or impair the power of the Legislature to administer the trust in a manner consistent with trust purposes. As a general matter, we think that the establishment of appropriate administrative procedures could assist the Legislature in implementing the state's duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses whenever feasible, and we assume any administrative determinations would be subject to appropriate judicial review.

In Audubon, the court determined that although administrative remedies before the board were available to persons asserting public trust claims to appropriated waters (Audubon, supra, pp. 448-449), it was not the intent of the Legislature to grant the board exclusive primary jurisdiction in water rights cases, and that the superior court has concurrent original jurisdiction in suits to determine water rights, including claims to appropriated waters for public trust uses (Audubon, supra, pp. 450-451). The court noted various statutes (Secs. 2000, 2001, and

2075, Wat. C.) expressly authorizing courts to refer cases to the board for determination of various water rights issues in suits brought before the court.

Thus, the court in Audubon impliedly recognized that the determination of procedures for asserting and determining public trust claims is a matter within the power of the Legislature, consistent with meeting the state's public trust duty of continuing supervision over the taking and use of appropriated water.

In our opinion, therefore, the Legislature may enact mandatory procedures under which public trust claims to appropriated waters could be asserted and determined.

Very truly yours,

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